87-876

No. _____

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

MILLER AND COMPANY,

Petitioner,

vs.

UNITED STATES, THE UNITED STATES DEPARTMENT OF COMMERCE, THE UNITED STATES DEPARTMENT OF THE TREASURY, THE UNITED STATES CUSTOMS SERVICE,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

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QUESTIONS PRESENTED

This petition presents the following questions:

1. Does not the decision of the Federal Circuit to dismiss Petitioner's appeal for lack of jurisdiction impermissibly restrict the scope of 28 U.S.C. § 1581(i) in such a manner as to preclude review of the administration and enforcement of the countervailing duty laws.

In the resolution of this question, the Court will be presented with these subsidiary questions:

   a. Whether the Federal Circuit's failure to consider the substantive issue before it impermissibly narrowed the scope of judicial review under 28 U.S.C. § 1581(i) by precluding consideration of such issues in the framework previously established by this Court in *Leedom v. Kyne*, 358 U.S. 184 (1958).

   b. Whether the Federal Circuit's failure to address directly the jurisdictional provisions of 28 U.S.C. § 1581(i), independent of 28 U.S.C. § 1581(c), has impermissibly narrowed the scope of judicial review available under 28 U.S.C. § 1581(i) regarding the enforcement and administration of the countervailing duty statute.

2. Whether Commerce's failure to complete its administrative review within the mandatory time periods contained in 19 U.S.C. § 1504 as extended by 19 U.S.C. § 1675 renders any subsequent action patently *ultra vires* and, therefore, whether the Federal Circuit's failure to consider this issue on appeal has by default

permitted the continued usurpation by the U.S. Court of International Trade of the congressional authority to enact legislation establishing the procedures for enforcement of the countervailing duty law.

Rule 28.1 Statement

Petitioner Miller and Company is a wholly-owned subsidiary, through various wholly-owned companies, of VEBA A.G., a publicly-owned German corporation.

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

The Petitioner Miller and Company respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Federal Circuit entered in the above-entitled proceeding on July 29, 1987.

Opinions Below

The Opinion of the Court of Appeals for the Federal Circuit appears at 824 F.2d 961 (1987). It is reprinted in the appendix hereto, p. 1a, *infra.*

The opinion of the U.S. Court of International Trade (Restani, J.) is reported at 648 F. Supp. 9 (1986). It is reprinted in the Appendix hereto, p. 9a, *infra*.

The initial opinion of the U.S. Court of International Trade (Restani, J.) relating to § 1581(i) jurisdiction is reported at 598 F. Supp. 1126 (1984). It is reprinted in the Appendix hereto, p. 14a, *infra*.

Jurisdiction

Invoking 28 U.S.C. § 1581(i) the Petitioner brought this action in the United States Court of International Trade. On November 21, 1984, the court reserved judgment on a motion to dismiss for lack of jurisdiction pending briefing on the issue of whether the government's actions were patently *ultra vires* such that jurisdiction under 28 U.S.C. § 1581(i) would be appropriate. On October 24, 1986, the United States Court of International Trade issued an opinion and order dismissing Petitioner's action for lack of jurisdiction under 28 U.S.C. § 1581(i).

On Petitioner's appeal, the Federal Circuit on July 29, 1987, affirmed the decision below. No petition for rehearing was sought.

The jurisdiction of this Court to review the judgment of the Federal Circuit is invoked under 28 U.S.C. § 1254(1).

The Constitutional Provision and Statutes Involved

U.S. Constitution, Amendment V

"No person shall . . . be deprived of life, liberty or property, without due process of law. . . ."

28 U.S.C. §§ 1581(c) and (i)

(See appendix 26a)

19 U.S.C. § 1504

(See appendix 22a)

19 U.S.C. § 1675

(See appendix 23a)

Statement of the Case

This action stems from the attempts of the U.S. Department of Commerce ("Commerce" or "ITA") and/or the U.S. Customs Service ("Customs") to collect countervailing duties pursuant to an administrative review of an outstanding countervailing duty order involving pig iron from Brazil which was published in the Federal Register on April 4, 1980 ("1980 Countervailing Duty Order"). As set forth in 19 U.S.C. § 1675, Commerce is periodically required to review countervailing duty orders in order to determine the actual amount of the countervailable subsidies conferred on the imported merchandise. Based on this determination, Customs is instructed to liquidate the entries at a duty rate equal to the amount of subsidies determined to have been conferred.

On November 30, 1983, Commerce published notice of the preliminary results of its administrative review of the 1980 Countervailing Duty Order covering entries during the period January 1, 1981, through December 31, 1981. A net subsidy of 5.41 percent of the f.o.b. invoice price was found for all shipments imported during this period.

On March 16, 1984, Commerce published notice of the final review determination covering January 1, 1981 through December 31, 1981, entries of pig iron from Brazil. A net subsidy of 10.31 percent *ad valorem* was found for 1981 imports.

Miller and Company, Petitioner herein, then commenced the underlying action in the U.S. Court of International Trade ("CIT"), challenging Commerce's authority to complete the administrative review of 1981 imports of pig iron from Brazil because Commerce had exceeded the mandatory time limits, set forth in § 1675. *See* Appendix p. 23a

for the statutory language of § 1675. Petitioner also challenged the failure of Customs to liquidate the subject entries as required by 19 U.S.C. § 1504(a). *See* Appendix p. 22a for the statutory language of § 1504. In that action, Petitioner asserted jurisdiction under 28 U.S.C. § 1581(i). *See* Appendix p. 26a for the statutory language of 28 U.S.C. § 1581. The CIT preliminarily determined that jurisdiction may be appropriate under 28 U.S.C. § 1581(i)[1] Specifically, the CIT found that if Commerce acted in an *ultra vires* manner, jurisdiction existed under § 1581(i). Accordingly, the CIT reserved final judgment on the jurisdiction issue pending briefing and consideration of the substantive issue of the *ultra vires* nature of Commerce's action. Appendix p. 22a.

On October 24, 1986, the CIT ruled that Commerce had not acted beyond its authority and, therefore, concluded that it had no jurisdiction under 28 U.S.C. § 1581(i) and dismissed the action.

Petitioner appealed to the Federal Circuit, specifically challenging the CIT's decision relating to the *ultra vires* nature of Commerce's action, the basis of its decision regarding § 1581(i) jurisdiction. In opposition, Respondents contested jurisdiction under § 1581(i) by asserting the legality of their actions and challenging, for the first time, the CIT's 1984 opinion which served as the judicial framework upon which its final decision was based. In reply, Petitioner again asserted that the framework upon which jurisdiction would lie was correct, although the conclusion was in error. Specifically, Petitioner submitted that the *ultra vires* action on the part of Commerce would make recourse to § 1581(c) and the standing requirement associated therewith inappropriate.

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[1] In an effort to cover all possibilities, an amendment to the original complaint asserted jurisdiction under 28 U.S.C. § 1581(c). This assertion was denied by the CIT.

Where petitioner disagreed with the CIT, which was the basis of its appeal, was with regard to the CIT's conclusion that the time periods set forth in 19 U.S.C. §§ 1504 and 1675 are directory, rather than mandatory in nature.

In further support of its jurisdictional argument, Petitioner asserted that independent of the question of the legality of Commerce's action, jurisdiction would properly lie under § 1581(i)(4) as that subsection confers jurisdiction to hear all actions arising from the administration and enforcement of the countervailing duty laws. Inasmuch as the complained of governmental action was Commerce's failure in a timely manner to complete its administrative review of the existing countervailing duty order, Petitioner submitted that the basis of the action was clearly directed to the administration of the countervailing duty laws. In this regard, Petitioner again asserted that it was not challenging the factual findings and legal conclusions upon which Commerce's determination was ultimately based, and, therefore, jurisdiction under § 1581(c) was not the exclusive avenue of relief.

In affirming the decision below, the Federal Circuit held that because Petitioner's challenge could have been raised under § 1581(c), had Petitioner participated in the administrative proceeding, jurisdiction could not be invoked under § 1581(i). In so concluding, the Federal Circuit stated that there had been no showing that § 1581(c) is manifestly inadequate to permit review of the complained of governmental action. In reaching this conclusion, the Federal Circuit did not address the independent grounds for asserting jurisdiction under § 1581(i) regarding the administration of the statute, nor did it address the asserted *ultra vires* action on the part of Commerce, the issue the CIT felt critical to a final resolution of the jurisdictional question.

Reasons for Granting the Writ

I.

THE UNLAWFUL, UNTIMELY COMPLETION OF AN ADMINISTRATIVE REVIEW RENDERS COMMERCE'S FINAL DETERMINATION IN THAT REVIEW A LEGAL NULLITY. EXCLUSIVE RECOURSE TO § 1581(c) JURISDICTION, AND THE STANDING REQUIREMENT ASSOCIATED THEREWITH, IS MANIFESTLY INADEQUATE IN THAT IT FORCES A PARTY TO ASSUME, AT THE BEGINNING OF THE REVIEW, THAT COMMERCE WILL NOT COMPLETE THE REVIEW IN A LAWFUL MANNER.

Unlike § 1581(i), which has no standing requirement, for an interested party to assert jurisdiction, under § 1581(c), it must be a party to the proceeding below. *See* 19 U.S.C. § 1516a(2)(A) and 28 U.S.C. § 2631(c). It is for this very reason that exclusive recourse under § 1581(c) is manifestly inadequate.

This is the essence of the error committed below. The Federal Circuit held that "Lacking standing to bring its action under § 1581(c), Miller bears the burden of establishing its standing to bring its action under § 1581(i), and, to do that, it must show that if it had availed itself of the remedy under § 1581(c), that remedy would have been manifestly inadequate." (824 F.2d at 964). Petitioner submits that Commerce's patently *ultra vires* action satisfies its burden of establishing that the remedy available under § 1581(c) would have been manifestly inadequate. This standard was addressed by the CIT below when it held "Clearly, if [Commerce's] actions were patently *ultra vires* it would be inappropriate to require [petitioner] to appear before it as a prerequisite to judicial review." (*Miller and Co. v. United States*, 598 F. Supp. at 1131) The CIT relied, in so holding, on *Leedom v. Kyne*, 358 U.S. 184, 189 (1958); *Independent Cosmetic Mfrs. and Distribs., Inc. v. H.E.W.*,

574 F.2d 553 (D.C. Cir.), *cert. denied*, 439 U.S. 893 (1978); and *United Parcel Service v. U.S. Postal Service*, 524 F. Supp. 1235 (D. Del. 1981).

In reaching its conclusion, however, the Federal Circuit never addressed the patently *ultra vires* nature of Commerce's action. As noted by the Federal Circuit,

> As explained *infra*, the court should have dismissed the complaint because of lack of standing. The parties extensively briefed the question of whether the agency acted beyond its authority when it issued its final determination after the statutory time period. Because we affirm in view of Miller's lack of standing, we need not discuss that question. (824 F.2d at 926, note*).

Not only is the Federal Circuit's analysis legally incorrect, it precludes review of the type established by this court in *Leedom v. Kyne*. There is no standing requirement associated with § 1581(i). If, as extensively briefed by Petitioner, Commerce's action was patently *ultra vires*, jurisdiction would properly lie under § 1581(i), thus rendering the standing requirement of § 1581(c) irrelevant. By relying exclusively on the standing requirement of § 1581(c) without any analysis as to its applicability in this action, the Federal Circuit's analysis was legally deficient.

Of greater significance, however, is the impact of the court's decision on the scope of § 1581(i) jurisdiction generally. Petitioner has consistently asserted jurisdiction under § 1581(i) based on the patently *ultra vires* action by Commerce. As noted by the Federal Circuit, the issue was extensively briefed by both parties to that court, as it was to the CIT below. In dismissing this issue, without discussion or consideration, the court stated that "mere allegations of financial harm or assertions that an agency failed to follow a statute, do not make a remedy established by Congress manifestly inadequate." (824 F.2d 964). Petitioner respectfully submits that if the actions taken

below were legally insufficent to raise consideration of this issue, the issue can never be raised. The Federal Circuit's determination that the manifest inadequacy standard has not been met without *any* consideration or decision on the essence of Petitioner's appeal, *i.e.* the illegality of Commerce's action, is clearly inconsistent with the prior precedent of this Court and the CIT below and absolutely precludes the very scrutiny recognized by this Court in *Leedom v. Kyne*. Moreover, the lack of explanation or elucidation of the issue, constitutes error in the nature of that previously rejected by this Court in *Dennison Mfg. Co. v. Panduit Corp.*, 106 S.Ct. 1578, 1579 (1986). The lack of explanation is particularly disturbing in this action as the Federal Circuit is the only court of appeals empowered to decide this issue and, absent a decision by this Court, is the sole source of appellate guidance on the scope of § 1581(i) jurisdiction.

Moreover, Petitioner submits that the standard enunciated by the Federal Circuit is deficient on other grounds. The Federal Circuit held that "Section 1581(i) jurisdiction may not be invoked when jurisdiction under another subsection of § 1581 *is or could have been available*, unless the remedy provided under that other subsection would be manifestly inadequate." (824 F.2d at 963) (emphasis added). For § 1581(c) to have been available, Petitioner would have had to participate in the administrative review at Commerce. At the time the review was commenced, however, this cause of action did not exist; it only matured at the time Commerce exceeded the statutory time limits on liquidation of entries embodied in 19 U.S.C. § 1504(b) as extended by 19 U.S.C. § 1675. At that time, the entries were deemed liquidated by operation of law, pursuant to 19 U.S.C. § 1504(a). As such, any action on the part of Commerce to issue a determination setting a duty rate at a different amount was clearly a legal nullity. The administrative review having terminated with the deemed liquidation by operation of law of the underlying entries,

there was no legal basis upon which Petitioner could perfect standing.[2] Consistent therewith, as a practical matter, there was no need to perfect standing as the entries had been deemed liquidated by operation of law. It was not until Commerce issued its final determination, nearly two years later, coupled with the imminent illegal "reliquidation" of the entries at issue, that Petitioner was required to act. If the Federal Circuit's reasoning is to be followed, therefore, it requires every importer to presume that Commerce will act in an unlawful manner and to participate below in order to preserve jurisdiction to contest subsequently the illegality of the review if it occurs. Assumed governmental illegality clearly cannot serve as a basis upon which jurisdiction must be perfected.

Given the clear conflict between this decision of the Federal Circuit and the prior decisions of the Court of International Trade, the prior precedent of the Federal Circuit through its predecessor court the Court of Customs and Patent Appeals, the prior precedent of this Court, and the the express statutory language of § 1581(i), it is incumbent on this Court to render a dispositive ruling on the scope of § 1581(i) jurisdiction. This decision is not merely a judicial exercise of limited significance. As will be discussed in greater detail, *infra*, Commerce's consistent violation of the mandatory statutory time constraints on liquidation of entries and the completion of administrative reviews has undermined the entire administration

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[2] The Federal Circuit pointed to the availability of § 1581(c) jurisdiction through reference to *Philipp Brothers*, *infra*, in which the importer raised this issue as part of its appeal of the determination at issue herein. In that appeal, the importer's main challenge was to the findings of fact and conclusions of law on which the determination was based. No such challenge was made here. As stated in the Petition, that this issue *may* be raised as part of the § 1581(c) appeal is not dispositive of whether it *must* be raised. Forced acquiescence to continued unlawful action cannot possibly be a prerequisite to judicial scrutiny.

of the countervailing duty laws. Without recourse to § 1581(i), any challenge to that unlawful action has thus far been precluded. Moreover, if the CIT adopts such a restrictive analysis of § 1581(i) jurisdiction, it will effectively eliminate the only presently available means for minimizing the delay and, therefore, for mitigating the damage associated therewith.

II.

THE FEDERAL CIRCUIT HAS IMPERMISSIBLY RESTRICTED THE SCOPE OF JURISDICTIONAL REVIEW UNDER 28 U.S.C. § 1581(i).

By effectively defining the jurisdictional issue below solely as a conflict between 28 U.S.C. §§ 1581(c) and 1581(i), the Federal Circuit has created an irrebutable absolute jurisdictional exclusivity in § 1581(c) unintended by Congress. It is unquestioned that under 28 U.S.C. § 1581(c), the CIT has exclusive jurisdiction over civil actions commenced under Section 516A of the Tariff Act of 1930 (codified at 19 U.S.C. § 1516a). Included in those actions, as a review of a determination on the record, are actions contesting any factual findings or legal conclusions upon which a determination under 19 U.S.C. § 1675 is based. (28 U.S.C. § 1581 is reprinted in the Appendix at p. 26a). The underlying appeal, however, did not contest the exclusive right of the CIT to hear the appeal, nor did it contest any factual findings or conclusions of law upon which Commerce's final determination was based. Instead, the only issues raised were the legal right of Commerce to continue and publish the results of its administrative review after the expiration of express statutory time limits and the failure of Customs to deem liquidated, as entered, the entries subject to the review. As such, jurisdiction was invoked under 28 U.S.C. § 1581(i). Thus, the issue before this Court is the scope of § 1581(i) jurisdiction and whether the action of the Federal Circuit has impermissibly nar-

rowed a jurisdictional grant of authority provided by Congress.

In defining § 1581(i) jurisdiction, the Federal Circuit held that "Section 1581(i) jurisdiction may not be invoked when jurisdiction under another subsection of § 1581 is or could have been available, unless the remedy provided under that other subsection would be manifestly inadequate. (citations omitted)." 824 F.2d at 963. The cases cited by the Federal Circuit support its conclusion that § 1581(i) jurisdiction *may* be invoked when the remedy provided by another subsection of § 1581 would be manifestly inadequate. The error in the Federal Circuit's reasoning, however, is its conclusion that § 1581(i) jurisdiction can only be asserted in that instance.

Section 1581(i) provides, in relevant part:

> (i) In addition to the jurisdiction conferred upon the Court of International Trade by subsections (a)-(h) of this section and subject to the exception set forth in subsection (j) of this section, the Court of International Trade shall have exclusive jurisdiction of any civil action commenced against the United States, its agencies, or its officers, that arises out of any law of the United States providing for—
>
> * * *
>
> (4) *administration and enforcement* with respect to the matters referred to in paragraphs (1)-(3) of this subsection and subsections (a)-(h) of this section.

(Emphasis added.)

That the enforcement and administration of the statute is at issue is obvious from the legislative history underlying § 1675. In enacting § 1675, Congress characterized its purpose as the *enforcement* of the countervailing duty laws.

H. Rep. No. 96-317 at Appendix p. 99a. Thus, Petitioner's cause of action clearly falls within § 1581(i)(4), because it raises issues regarding "administration and enforcement with respect to matters referred to in paragraphs (1)-(3) of this subsection and subsections (a)-(h) of this section." *UST, Inc. v. United States*, 648 F. Supp. 1, 3 (Ct. Int'l Trade 1986) ("*UST*"). Or, as characterized in *Vivitar Corp. v. United States*, 7 CIT 170, 585 F. Supp. 1419 (Ct. Int'l Trade 1984), *aff'd*, 761 F.2d 1552 (Fed. Cir. 1985):

> The legislative history makes clear that Congress intended § 1581(i)(4) to give this court broad residual jurisdiction over cases arising out of the administration and enforcement of the substantive international trade law that is also the subject matter of the more specific jurisdictional provisions in section 1581.

In so concluding, the court in that case cited to the legislative history underlying § 1581(i), to wit:

> . . . subsection (i), and in particular paragraph (4), makes clear that the court is not prohibited from entertaining a civil action relating to an antidumping or countervailing duty proceeding so long as the action does not involve a challenge to a determination specified in section 516A of the Tariff Act of 1930.

What is being challenged here is not a determination specified in section 516A of the Tariff Act of 1930. That Petitioner has not challenged the results of the administrative review, *i.e.*, the determination under § 516A, is evidenced by the fact that none of the arguments below addressed a single factual finding or legal conclusion by ITA upon which the final results were based. (Compare cases cited by the CIT in *Philipp Bros. Inc. v. United States*, 630 F. Supp. 1317, 1320 (1986), *appeal dismissed*, No. 86-1122 (Fed. Cir. July 18, 1986) ("Philipp Bros."). Instead, the challenge involved herein is directed to ITA's

authority to continue the administrative review under 19 U.S.C. § 1675 and publish the results of that review after the expiration of the time limits set forth in § 1504 as extended by § 1675. As such, petitioner seeks only to contest the illegal deprivation of its property and resulting harm arising from the unlawful exercise of governmental authority. Such deprivation of property violates Petitioner's fifth amendment rights.

Neither the Federal Circuit's decision nor the cases cited by it in support of its impermissibly narrow reading of § 1581(i) jurisdiction addresses the applicability of § 1581(i)(4) to the issue involved herein. The only case relied upon by the Federal Circuit (824 F.2d at 963) which addressed the relationship of §§ 1581(c) and 1581(i) was not conclusive on this issue, although it did recognize, citing to the legislative history, that section 516A, and therefore, § 1581(c), was *not* the *exclusive* remedy for all grievances arising from the administration of the antidumping, and, therefore, countervailing duty laws.[3]

The most relevant discussion of this issue can be found in a CIT decision, briefed by Petitioner, but never addressed by the Federal Circuit. In *UST*, the CIT specifically addressed the issue of whether jurisdiction was proper under § 1581(i) in an action involving the untimely completion of an administrative review. *UST* involved an interlocutory attempt to force completion of the administrative review. In denying motions to dismiss on a variety of issues, the court held that § 1581(i) jurisdiction

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[3] *Royal Business Machines Inc. v. United States*, 669 F.2d 692, 701-702 (C.C.P.A. 1982). In that case, however, the very issue which was the subject of the appeal, *i.e.* whether the scope of the antidumping order included a specific product, was included in both the final determinations of the ITC and Commerce and, therefore, was properly subject to an appeal under § 1581(c). Since the standards for review of antidumping and countervailing statutes are identical, guidance to one is equally applicable to the other.

was proper, citing, *inter alia, Royal Business Machines, Inc. v. United States, supra,* and distinguishing *United States v. Uniroyal, Inc.*, 687 F.2d 467 (C.C.P.A. 1982) upon which the Federal Circuit relied. Specifically, the court held:

> If this Court did not have such broad jurisdictional powers, it is not too difficult to imagine circumstances where a possible recalcitrant ITA might determine never to complete a section [1675] review simply to escape judicial scrutiny. This clearly would thwart the will of Congress and the entire administrative process.
>
> Defendant's reliance upon *United States v. Uniroyal,* as also distinguished in *Ceramica,* is again misplaced "since [Uniroyal] did not involve the applicability of 28 U.S.C. § 1581(i) vis-a-vis 19 U.S.C. § 1516a." *Ceramica,* 5 CIT at 23, 557 F. Supp. at 601. Accordingly, the Court holds that it may exercise jurisdiction under section 1581(i) concerning the administration of section [1675] reviews. 648 F. Supp. at 4.[4]

While it is recognized that *UST* involved an interlocutory action, what is significant is the court's exercise of jurisdiction under § 1581(i) to the very issue involved in the underlying appeal, *i.e.* the timely completion of the administrative review. If, as the Federal Circuit's opinion would suggest, § 1581(i) jurisdiction does not extend to that issue, Petitioner questions whether any action, interlocutory or otherwise, could be brought under § 1581(i) to force compliance with the statutory requirements. Such a result is clearly belied by the precedent, relied upon by the Federal Circuit, on a different but related issue.

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[4] The propriety of § 1581(i) jurisdiction over this issue was also discussed in *American Permac, Inc. v. United States,* 642 F. Supp. 1187 (Ct. Int'l Trade 1986) ("PERMAC").

In its only substantive discussion of the interplay of § 1581(c) and 1581(i), the Federal Circuit characterized the issue raised by Petitioner as one contesting merely the procedural correctness of the countervailing duty order. (824 F.2d at 964.) Having so defined the issue, the Federal Circuit determined that the issue raised in the underlying action was appealable under § 1581(c) as part of Commerce's determination, citing *Montgomery Ward & Co. v. Zenith Radio Corp.*, 673 F.2d 1254 (C.C.P.A.), *cert denied*, 459 U.S. 943 (1982) ("*Montgomery Ward*"). Even assuming the characterization were proper, the case relied upon by the Federal Circuit is not dispositive of the issue. In *Montgomery Ward*, the court stated, "Thus, the merits of a determination, as well as its procedural correctness, are subject to judicial review." (673 F.2d at 1260). This, however, was dictum in a part of the decision in which the court held that a settlement agreement is not a determination for which jurisdiction to appeal under § 1581(c) will properly lie.

In discussing jurisdiction under § 1581(i), however, after citing to the legislative history quoted previously, the court in *Montgomery Ward* concluded, "Thus we have no doubt that Congress intended that the Court of International Trade, and not a district court, have jurisdiction of civil actions for review of enforcement and administration of the antidumping [and, therefore, countervailing duty] statute to the extent appropriate under the APA." (673 F.2d at 1261). In this regard, the court repeatedly held that the scope of its review, under § 1581(i) was ". . . limited to determining whether procedural requirements have been satisfied." (*Id.* at 1261. *See also id.* at 1263 and 1264). The court ultimately held that the action did not properly lie within the jurisdiction of § 1581(i). The court so concluded based on its determination that "[t]he Zenith complaint is manifestly not directed to correction of procedural irregularity." (*Id.* at 1265).

In the instant appeal, the correction of procedural irregularity was the very issue before the Federal Circuit. What was being contested was whether Commerce and Customs had complied with the statutory requirements of 19 U.S.C. §§ 1504 and 1675, the procedures contained therein, as well as with the regulations promulgated thereunder. Compliance with these statutory requirements unquestionably involves procedural irregularity inasmuch as Congress has specifically recognized that provisions contained in § 1675 constitute procedural safeguards in the administration of the investigation. (H. Rep. No. 96-317 at Appendix p. 103a). Further, the correction sought was the vacating of Commerce's final determination and an order directing that the subject entries be deemed liquidated by operation of law pursuant to 19 U.S.C. § 1504(a).

The Federal Circuit's reliance on the dictum contained in *Montgomery Ward* is, therefore, misplaced. Even assuming that this action could have been brought under § 1581(c), *Montgomery Ward* clearly indicates that § 1581(c) is not the exclusive avenue of relief. As such, the court's characterization of the issue as one constituting a "legal conclusion" involving the "procedural correctness" of the determination and, therefore, specifically and exclusively reviewable under § 1581(c) is in error. Thus, the Federal Circuit's failure to address the propriety of invoking § 1581(i) jurisdiction in an action directed to the correction of procedural irregularity conflicts with its own precedent set forth in *Montgomery Ward* and the decisions of this court cited therein. *Morgan v. United States*, 304 U.S. 1, 22 (1938); *Watt v. Energy Action Education Foundation*, 454 U.S. 151 (1981).

III.

COMMERCE'S COMPLETION OF THE ADMINISTRATIVE REVIEWS, AFTER THE TIME LIMITS SET FORTH IN 19 U.S.C. § 1504 AS EXTENDED BY 19 U.S.C. § 1675 CONSTITUTED A PATENTLY *ULTRA VIRES* ACT.

The basis of Petitioner's action was Commerce's blatant disregard of its mandatory obligations to administer the countervailing duty laws in a timely manner.

A. The Time Limits Set Forth in 19 U.S.C. § 1504 Are Mandatory

The Customs Procedure Reform and Simplification Act of 1978 set forth, for the first time, mandatory time limits requiring Customs to liquidate entries of merchandise within a specified period of time. As stated in 19 U.S.C. § 1504(a):

> Liquidation.—Except as provided in subsection (b) of this section, an entry of merchandise not liquidated within one year from:
>
> (1) the date of entry of such merchandise. . . . shall be deemed liquidated at the rate of duty, value, quantity, and amount of duties asserted at the time of entry by the importer of record.

The time limits contained in § 1504 impose a mandatory duty on Customs and were designed to change pre-1978 practice, whereby Customs had no limit on its time to liquidate entries. The legislative history underlying § 1504 clearly supports the plain meaning of the statute:

> The bill, as amended by the Committee, would put a 1-year limit on the time which customs has to liquidate an entry.

S. Rep. No. 95-778 at Appendix, p. 73a.

In the absence of liquidation by Customs, the express requirements of § 1504 mandate that the subject entries became liquidated by operation of law one year from the date of their entry or withdrawal from warehouse. The only arguable basis to prevent such liquidation would arise from an extension of the one-year time limit applicable in certain limited circumstances. 19 U.S.C. § 1504(b) provides, in relevant part:

> Extension.—The Secretary may extend the period in which to liquidate an entry by giving notice of such extension to the importer of record, in such form and manner as the Secretary shall prescribe in regulations, if—. . .
>
> (2) liquidation is suspended as required by statute or court order. . . .

19 U.S.C. § 1504(b)(2). Since no court order is involved herein, the only arguable statute which could authorize an extension under § 1504(b)(2) in this action is § 1675. Since liquidation in this case did not take place within a time limit permitted by extension through § 1675, the subject entries must be deemed liquidated as entered.

B. Section 1675 Requires Commerce To Conduct Its Administrative Reviews Of Countervailing Duty Orders Within The Time Frame As Required By Statute.

Assuming § 1675 authorizes an extension of the mandatory one-year liquidation requirement in § 1504, the mandatory time limits of § 1675 limit the permissible period of extension under § 1504(b)(2). Section 1675 requires Commerce to conduct annual reviews of outstanding countervailing duty orders, to determine the amount of any net subsidy and to issue a notice for assessment of any countervailing duties.

(a) Periodic Review of Amount of Duty—

(1) In general—*At least once during each 12-month period beginning on the anniversary of*

> *the date of publication of a countervailing duty order* under this subtitle or under section 1303 of this title . . . the administering authority, after publication of notice of such review in the Federal Register, *shall*—
>
> (A) review and determine the amount of any net subsidy, . . .
>
> and *shall* publish the results of such review, together with notice of any duty to be assessed [and] estimated duty to be deposited . . . in the Federal Register.

19 U.S.C. § 1675(a)(1) (emphasis added).[5]

On its face, 1675 imposes a mandatory obligation upon Commerce to conduct and complete its administrative review within a specified period of time, *i.e.* at least annually. Of course, as in all statutory construction, the intent of Congress must control. *Vivitar Corp. v. United States*, 8 CIT 109, 593 F. Supp. 420, 425 (1984), *aff'd*, 761 F.2d 1552 (Fed. Cir. 1985), *cert. denied*, 106 S.Ct. 791 (1986) (citations omitted). In order to determine Congressional intent, the starting point is the statutory language itself. *Id.*, 593 F.Supp. at 425.

In this case, the plain language of § 1675 commands Commerce to conduct its administrative reviews at least annually. Under § 1675, Commerce *shall review and determine* the amount of any net subsidy and *shall publish* the results of such review, together with a notice of any countervailing duties to be assessed, within twelve months beginning on the anniversary date of the imposition of the countervailing duty order. Thus, Commerce was commanded to adhere to the rigid time schedule set forth in § 1675.

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[5] Although § 1675 was amended in 1984, it is the herein cited language which is controlling in this action. Moreover, the new language does not alter the timing requirements.

Moreover, the plain meaning of § 1675 as creating a mandatory time period is strongly reinforced by the legislative history of the Trade Agreements Act of 1979.

> Section 751 [19 U.S.C. § 1675] of the bill would *require the authority, at least once during each 12-month period* beginning on the anniversary date of the date of publication of the countervailing duty order . . . to review—
>
> (1) the amount of any net subsidy . . .
>
> [T]he Secretary would be *required* to publish a summary of the results of his review, together with the notice of any duty to be assessed [and] estimated duty to be deposited. (Emphasis added.)

S. Rep. No. 96-249 at Appendix p. 91a.

The Senate Report thus makes clear that Commerce was required to conduct its reviews of a countervailing duty order and publish the results of those reviews at least once during each 12-month period, beginning on the anniversary of the date of the order's publication.

There is further evidence of Congressional intent. "[T]his provision [§ 1675] expedites the administration of the assessment phase of . . . countervailing duty investigations while . . . introducing more procedural safeguards." H. Rep. No. 96-317 at Appendix p. 103a. The administration of the assessment phase of countervailing duty investigations was to be expedited through annual reviews conducted within a specified time period. Similarly, completion of administrative reviews within a timely manner is a "procedural safeguard" designed to insure timely calculation of countervailing duty liability.

In fact, the Senate emphatically noted that time limits imposed by the Trade Agreements Act are mandatory.

> The committee expects the 20-day time limit [in which Commerce determines the sufficiency of a

> countervailing duty petition], *and all other time limits under title VII of the Tariff Act*, to be met in *all* cases.

S. Rep. No. 96-249 at 449 (emphasis added). *See also* Appendix p. 79a.

One of the most important motives behind the enactment of 1675 was a desire to change Treasury practice[6] and to place time limits on the assessment of countervailing duties.

> The Committee feels very strongly that both the countervailing and antidumping duty laws have been inadequately enforced in the past, including the lack of resources devoted to this important area of the law. The provisions of this bill are intended to remedy this situation.

H. Rep. No. 96-317 at Appendix p. 99a.

It was specifically in response to the unbridled discretion in suspending the liquidation of entries that both §§ 1504 and 1675 were enacted. Therefore, it is anything but coincidence that § 1504(a), like § 1675(a), contains a mandatory limitation of one-year for the liquidation of entries. Both sections were meant to expedite antidumping and countervailing duty proceedings, so as to eliminate dilatory practice with regard to the liquidation of entries.

The remedy for Commerce's untimely action already existed in the statute. The Tariff Act of 1930 provides an explicit consequence for not complying with the mandatory provisions of § 1675—*i.e.*, entries not liquidated in the requisite periods will be deemed liquidated at the rate of duty, value, quantity and amount of duties asserted at the time of entry by the importer. Such a consequence is ines-

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[6] Prior to enactment of the Trade Agreements Act of 1979, the Department of the Treasury administered the countervailing duty law.

capable in light of the Federal Circuit's decision in The Ambassador Division of Florsheim Shoe Co. v. United States, 748 F.2d 1560 (Fed. Cir. 1984) ("Florsheim") that §§ 1504 and 1675(a) were enacted *in pari materia. Florsheim, supra,* at 1565.[7]

Commerce's present practice under § 1675, however, resembles the very situation that existed prior to the passage of the Trade Agreements Act of 1979. Commerce recognizes no time limits on its conduct of administrative reviews, so that assessment of countervailing duties becomes an indefinite, unpredictable process.

C. The Federal Circuit's Decision Supports Judicial Legislation and Absurd Results

The issue on appeal to the Federal Circuit centered on one basic consideration—whether the statutory provisions, including the time limits set forth in §§ 1504 and 1675, are mandatory. While the Federal Circuit did not address the issue, it is one of purely legal interpretation which Petitioner respectfully submits should be decided by this Court. The importance of this Court's decision on that question transcends the mere technical-legal determination. This Court's decision will have substantial ramifications concerning the overall interpretation and administration of the countervailing duty and Customs laws. The issue raised in the underlying appeal has been raised in a series of cases beginning with *Philipp Bros.* As a result of *Philipp Bros.* and its progeny, including the underlying action, a

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[7] Congress had previously recognized the relationship between § 1504 and the assessment of countervailing duties under the "old" countervailing duty law.

> There are no time limits on the assessment of countervailing duties under current law. However, under section 504 of the Tariff Act (19 U.S.C. 1504) liquidation of entries must generally occur within 1 year after the date of entry . . .

S. Rep. No. 96-249 at Appendix p. 78a.

trend is developing which, if allowed by this Court to continue, will make a mockery of the administration of § 1675.

As previously discussed, Congress established very specific procedures for conducting countervailing duty administrative reviews. The manner in which Commerce has conducted the administrative reviews of countervailing duty and antidumping investigations, however, is completely inconsistent with the statutory scheme. Congress established this scheme in response to the perceived unacceptable manner in which the Department of the Treasury had previously been conducting countervailing duty and antidumping investigations and assessing such duties. The administration of the new statute by Commerce, however, now affirmed by the CIT and the Federal Circuit, leads to absurd results in the administration of these laws, results which are undermining the entire statutory scheme created by Congress.

The law in § 1675, as determined by the Federal Circuit in *Florsheim*, is that Commerce implicitly has the authority to suspend liquidation of entries pending an administrative review to determine the amount of countervailing duties actually payable on entries during a specified time period. To make this administrative process work properly, however, and as recognized by the Federal Circuit in *Florsheim*, there is an underlying premise that Commerce will strictly adhere to the time limits set forth in the law.

This premise, however, was rejected by the CIT in this case, relying exclusively on the stare decisis effect of *Philipp Bros.* To understand the CIT decision in this case, therefore, reference must be made to *Philipp Bros.*, the first in the series of cases in which this issue arises.

Philipp Bros. itself merely contained a conclusory decision, based on analysis solely limited to the language of § 1675, that the statute was not mandatory because it did not provide for an automatic termination of the suspension

of liquidation. The CIT, therefore, concluded that § 1675 does not impose a penalty of deemed liquidation for the delay. In so deciding, the CIT effectively rejected the Federal Circuit's prior decision in *Florsheim*,

> that both § 1504 and the provisions respecting countervailing duties, such as § 1675(a), were enacted as *in pari materia*, both being for amendment to . . . the Tariff Act of 1930, and therefore a legislative intent to have them work harmoniously together, and for neither to frustrate the other . . . is very much to be inferred. (748 F.2d at 1565, discussing 19 U.S.C. §§ 1504 and 1675(a)).

The CIT could not have reached the decision in *Philipp Bros.* had it properly followed the Federal Circuit's decision that the two statutes were enacted *in pari materia* and that they should not be interpreted in such a manner as to frustrate one another.

To appreciate the full impact of *Philipp Brothers* on later CIT actions, however, it is first useful to consider *Permac*. The court's decision in *Permac*, which was an antidumping case, clearly demonstrates the absurd results[8] flowing from the CIT decisions that §§ 1675 and 1504 are not mandatory.

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[8] The proper basis on which to examine Permac is to use the standard applied by the Federal Circuit in Florsheim, *i.e.*, the "absurd consequences" doctrine of interpretation established by this Court in Church of the Holy Trinity v. United States, 143 U.S. 457 (1892) ("Holy Trinity"). As quoted in Florsheim, this Court in Holy Trinity stated at page 459:

> This is not the substitution of the will of the judge for that of the legislator, for frequently words of general meaning are used in a statute, words broad enough to include an act in question, and yet a consideration of the whole legislation, or of the circumstances surrounding its enactment, or of the *absurd results* which follow from giving such broad meaning to the words, makes it

Permac effectively has eliminated all the Congressionally established time limits for liquidation of entries under § 1504 as they pertain to antidumping and countervailing duty cases. The holding of *Permac* is quite simple. The CIT found that § 1675, as a result of the *Florsheim* decision, impliedly gives Commerce the authority to suspend liquidation for conducting antidumping administrative reviews. The CIT also found that under the provisions of 19 U.S.C. § 1504(b)(2), providing for an extension of the mandatory time period for liquidation of entries, § 1675 constitutes a statute which requires the suspension of liquidation. Citing *Philipp Bros.*, the CIT in *Permac* then found that the time limits in § 1675 for completing administrative reviews are directory and not mandatory. Coupling these cases together, the CIT then reached the erroneous conclusion that "so long as suspension of liquidation continues to be required by statute (or court order), a suspension may continue *indefinitely*." *Permac*, 642 F. Supp. at 1191. (Emphasis added.)

Considering the extensive legislative histories of §§ 1504 and 1675, such a conclusion is completely contrary to the Congressional intent that was the basis for establishing time limits for the liquidation of entries and collection of countervailing duties. The above conclusion not only leads to "absurd results" in itself, but the absurdity is compounded by the additional discussions set forth in *Permac*.

The CIT in *Permac*, cited with approval in the underlying decision on appeal here, reasoned that if an interested party to an investigation wishes to have the statutory time limits enforced, it should bring a mandamus action to force Commerce or Customs to adhere to their respective statutory time limits. *Permac*, 642 F. Supp. at 1195,

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unreasonable to believe that the legislature intended to include the particular act. (Emphasis added.)

748 F.2d at 1564.

cited with approval in *Miller and Co.*, 648 F. Supp. at 10, fn.2. However, the issue in a mandamus action, which would determine whether Commerce or Customs must abide by the statutory time limits, has already been decided in *Permac*. Specifically, the CIT in *Permac* has determined that the statutory provisions of § 1675 are not mandatory and that suspension of liquidation may continue indefinitely until Commerce completes an administrative review, thereby rendering liquidations in this situation a discretionary and not ministerial act. Thus, even if interested parties file mandamus actions to force agency compliance with § 1675 time limits, the actions will fail and constitute nothing more than an exercise in judicial futility.

In *UST*, also cited with approval by the CIT in the underlying decision on appeal, this very issue arose. The plaintiff filed an action requesting a writ of mandamus requiring Commerce to complete its administrative review within the statutory time limits. The CIT, however, did not issue the writ of mandamus, relying on the *Philipp Bros.* and *Permac* decisions that § 1675 is directory and not mandatory. As an alternative, the CIT accepted a Commerce-supplied timetable establishing the period, beyond that set forth in § 1675, in which Commerce would complete the administrative review under consideration. Commerce is to report monthly to the CIT on the progress of the review. *See also Nissan Motor Corp in U.S.A. v. United States*, ___ CIT ___, 651 F.Supp. 1450 (1986) ("*Nissan*").

UST and *Nissan* unequivocally and impermissibly represent "the substitution of the will of the judge for that of the legislator." *See Holy Trinity, supra.* The CIT has thus become the administering agency and taken control of the scheduling and progress of ongoing administrative reviews. The statute simply does not give the CIT such administrative responsibilities nor the right to make unilateral determinations as to the permissible period of Commerce's delay. The responsibility and the obligation to

conduct administrative reviews on a timely basis is already established in the law and rests solely with the Department of Commerce.

In expanding upon the CIT's decision in *Philipp Bros.*, the CIT in *Permac*, this case, *UST* and *Nissan* has followed the logical scenario which ensues if the CIT refuses to follow the plain meaning of the statute and its supporting legislative history. These four decisions create "absurd results" which were not intended by Congress in enacting the provisions of §§ 1504 and 1675. In *Permac*, the CIT has erroneously gone far beyond Congress's legislative intent by allowing Commerce and Customs to ignore their statutory responsibilities through a judicial grant of an "indefinite" period of time in which to complete administrative reviews and liquidate entries. In *UST* and *Nissan*, the CIT has taken over administrative responsibilities in establishing and supervising extra-statutory timetables in ongoing reviews. Under these judicial interpretations, the legislative purposes for changing the countervailing duty law and the Customs law to provide for more rapid liquidation of entries are undermined and the statutory provisions are rendered meaningless.

The Federal Circuit previously and correctly determined that the provisions of §§ 1675 and 1504 are to be considered *in pari materia*. The statutes cannot be considered separately when applied to a countervailing duty determination. To consider them otherwise has precipitated the creation of an administrative procedure totally unforeseen and unintended by Congress. If this interpretation of the statutes is allowed to stand, the administration of the countervailing duty administrative reviews will become even more of an absurdity falling farther and farther from the statutory provisions and raising a host of new issues.[9] As

[9] For example, does unilateral imposition by the CIT of an extra-statutory time schedule preclude a further challenge as to its reasonableness? If not, against whom would the subsequent mandamus be directed, Commerce or the CIT?

such, the action requested of this Court is vitally important to the overall administration of the countervailing duty law.

CONCLUSION

As set forth in this Petition, the issues involved, while critically important to Petitioner, transcend the administration of the countervailing duty laws. They address the scope of review under 28 U.S.C. § 1581(i) and its availability to restrict patently *ultra vires* acts on the part of the Department of Commerce. They are similarly critical to the interpretation of two of the statutes relied upon by Commerce and the U.S. Customs Service to enforce existing countervailing duty orders. It is for this reason that a writ of certiorari to the United States Court of Appeals to the Federal Circuit is appropriate.

Petitioner respectfully requests that this Court issue the appropriate writ.

Respectfully submitted,

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Dated: October 27, 1987

APPENDIX

United States Court of Appeals for the Federal Circuit

87-1083

MILLER & COMPANY,
Plaintiff-Appellant,

v.

THE UNITED STATES, THE UNITED STATES DEPARTMENT OF COMMERCE, THE UNITED STATES DEPARTMENT OF THE TREASURY and THE UNITED STATES CUSTOMS SERVICE,
Defendants-Appellees.

Herbert C. Shelley, Howrey & Simon, of Washington, D.C., argued for appellant. With him on the brief were *Joel D. Kaufman* and *Alice A. Kipel.*

Elizabeth C. Seastrum, Commercial Litigation Branch, Department of Justice, of Washington, D.C., argued for appellee. With her on the brief were *Richard K. Willard,* Assistant Attorney General, *David M. Cohen,* Director and *Velta A. Melnbrencis,* Assistant Director. Also on the brief were *Douglas A. Riggs,* General Counsel, *M. Jean Anderson,* Chief Counsel for International Trade and *Andrea E. Migdal,* Attorney-Advisor, Office of the Deputy Chief Counsel for Import Administration, U.S. Department of Commerce, of counsel.

Appealed from: U.S. Court of International Trade

Judge Restani

United States Court of Appeals for the Federal Circuit

87-1083

MILLER & COMPANY,

Plaintiff-Appellant,

THE UNITED STATES, THE UNITED STATES DEPARTMENT OF COMMERCE, THE UNITED STATES DEPARTMENT OF THE TREASURY and THE UNITED STATES CUSTOMS SERVICE,

Defendants-Appellees.

DECIDED: July 29, 1987

Before MARKEY, *Chief Judge,* RICH, *Circuit Judge,* and BALDWIN, *Senior Circuit Judge.*

MARKEY, *Chief Judge.*

Appeal from a decision of the United States Court of International Trade, 648 F. Supp. 9 (1986), dismissing the complaint of Miller & Company (Miller). We affirm.

BACKGROUND

On April 4, 1980, the International Trade Administration (ITA) of the United States Department of Commerce published a countervailing duty order, 19 U.S.C. § 1303, on pig iron from Brazil. 45 Fed. Reg. 23,045 (1980). On July 7, 1983, the ITA announced its intent to conduct an administrative review of that countervailing duty order for the period of January 1, 1981 through December 31, 1981, as 19 U.S.C. § 1675(a)(1) then required. 48 Fed. Reg. 31,280 (1983). The ITA published its preliminary results on November 30, 1983, inviting comments and requests for hearings from "interested parties." 48 Fed. Reg. 54,091 (1983). The ITA published its final results on March 16, 1984, and directed the Customs Service to assess countervailing duties in excess of the cash deposits already paid

on 1981 imports of Brazilian pig iron. 49 Fed. Reg. 9,923 (1984).

Miller, an importer, did not participate in the proceedings in the ITA. After the ITA published its final determination, Miller filed an action in the Court of International Trade challenging that determination and seeking to enjoin its implementation. Miller alleged that, because the ITA did not complete its review within the statutory time period, it lacked authority to enforce its final determination. Miller initially alleged jurisdiction under 28 U.S.C. § 1581(i), but sought to amend its summons to include an assertion of jurisdiction under 28 U.S.C. § 1581(c). The government filed alternative motions for dismissal or summary judgment.

On November 21, 1984, the Court of International Trade denied Miller's motion to amend because Miller had not participated in the proceedings in the ITA, a requirement for judicial review of a countervailing duty order determination under 28 U.S.C. § 1581(c). 598 F. Supp. 1126, 1128-29 (*Miller I*). The court did not decide at that time whether jurisdiction existed under 28 U.S.C. § 1581(i). The court concluded that 28 U.S.C. § 1581(i) could serve as an avenue of relief "if the ITA's actions were patently *ultra vires* [so that] it would be inappropriate to require [Miller] to appear before it as a prerequisite to judicial review." 598 F. Supp. at 1131. The court reserved decision on the government's motions pending briefing on the "patent violation" question. *Id.*

On October 24, 1986, citing *Ambassador Div. of Florsheim Shoes* v. *United States,* 748 F.2d 1560 (Fed. Cir. 1984) and *Philipp Bros., Inc.* v. *United States,* 630 F. Supp. 1317 (Ct. Int'l Trade 1986), *appeal dismissed,* No, 86-1122 (Fed. Cir. July 18, 1986), the Court of International Trade ruled that the ITA had not acted beyond its authority in issuing its final determination after the statutory time period. Having thus exercised its jurisdiction in ruling on the mer-

its of Miller's claim, the court nonetheless concluded that it had no jurisdiction under 28 U.S.C. § 1581(i) and dismissed the action.* 648 F. Supp. 9 (*Miller II*).

ISSUE

Whether the Court of International Trade erred in dismissing Miller's complaint.

OPINION

The jurisdiction of the Court of International Trade is set forth in 28 U.S.C. § 1581. Subsections (a)-(h) give that court exclusive jurisdiction over specific types of civil actions. Miller must establish standing under subsection (i), a broad residual jurisdictional provision.

Section 1581(i) jurisdiction may not be invoked when jurisdiction under another subsection of § 1581 is or could have been available, unless the remedy provided under that other subsection would be manifestly inadequate. *United States* v. *Uniroyal, Inc.*, 687 F.2d 467, 475 (CCPA 1982) (Nies, J., concurring); *Lowa, Ltd.* v. *United States*, 561 F. Supp. 441, 446-47 (Ct. Int'l Trade 1983), *aff'd*, 724 F.2d 121 (Fed. Cir. 1984); *see American Air Parcel Forwarding* v. *United States*, 718 F.2d 1546, 1549-51 (Fed. Cir. 1983) (no § 1581(i) jurisdiction where importers could have taken

* As explained *infra*, the court should have dismissed the complaint because Miller lacked standing. The parties extensively briefed the question of whether the agency acted beyond its authority when it issued its final determination after the statutory time period. Because we affirm in view of Miller's lack of standing, we need not discuss that question. Similarly, we say nothing of challenges to ITA determinations other than those specified in § 516A of the Tariff Act of 1930. *See Ceramica Regiomontana, S.A.* v. *United States*, 557 F. Supp. 596, 599-600 (Ct. Int'l Trade 1983) (§ 1581(i) conferred jurisdiction over countervailing duty claim outside the scope of 19 U.S.C. § 1516a and 28 U.S.C. § 1581(c)); 28 U.S.C. § 1581(i)(4); H.R. Rep. No. 1235, 96th Cong., 2d Sess. 48, *reprinted in* 1980 U.S. Code Cong & Admin. News 3729, 3760.

steps to qualify under §§ 1581(a) or (h), and remedies under those subsections would not have been inadequate), *cert. denied*, 466 U.S. 937 (1984); *United States Cane Sugar Refiners' Ass'n* v. *Block*, 683 F.2d 399, 402 n.5 (CCPA 1982) ("[t]he delay inherent in proceeding under § 1581(a) makes relief under that provision manifestly inadequate and, accordingly, the court has jurisdiction in this case under § 1581(i)."); *see also Royal Business Mach., Inc.* v. *United States*, 669 F.2d 692, 701-02 (CCPA 1982) (importers whose § 1581(c) action was untimely could not use § 1581(i) as alternative jurisdictional basis). Where another remedy is or could have been available, the party asserting § 1581(i) jurisdiction has the burden to show how that remedy would be manifestly inadequate. *See American Air Parcel*, 718 F.2d at 1550-51; *Pistachio Group of the Ass'n of Food Indus., Inc.* v. *United States*, 638 F. Supp. 1340, 1342 (Ct. Int'l Trade 1986).

I. Availability of a § 1581(c) Cause of Action

Under 28 U.S.C. § 1581(c), the Court of International Trade has exclusive jurisdiction over civil actions commenced under section 516A of the Tariff Act of 1930. However, those civil actions may be brought *only* by an "interested party who was a party to the proceeding in connection with which the matter arose." 28 U.S.C. § 2631(c).

Section 516A of the Tariff Act of 1930, codified at 19 U.S.C. § 1516a, lists the determinations judicially reviewable under 28 U.S.C. § 1581(c) and the requirements for obtaining review:

> (a)(2) Review of determinations on record
>
> (A) In general.—Within thirty days after-
>
> (i) the date of publication in the Federal Register of-

> (I) notice of any determination described in clause (ii), (iii), (iv), or (v) of subparagraph (B),
>
> * * * * *
>
> an interested party who is a party to the proceeding in connection with which the matter arises may commence an action in the United States Court of International Trade by filing a summons, and within thirty days thereafter a complaint, . . . contesting any factual findings or legal conclusions upon which the determination is based.
>
> **(B) Reviewable determinations.**—The determinations which may be contested under subparagraph (A) are as follows:
>
> * * * * *
>
> (iii) A final determination . . . under section 1675 of this title.

Administrative reviews of countervailing duty orders, such as the one here at issue, are final determinations under 19 U.S.C. § 1675.

The government argues that Miller's cause of action, because it challenges a determination listed in 19 U.S.C. § 1516a, falls under 28 U.S.C. § 1581(c). Miller says, "This position totally ignores the gravamen of Miller's argument—what is being challenged here is *not* the factual findings or legal conclusions upon which the ITA's final results are based, rather it is ITA's authority to continue the review and publish the results after the expiration of the [statutory] time limits . . . ." Miller argues that its present action does not fall under 28 U.S.C. § 1581(c) because actions under § 1581(c) are brought to challenge the merits of an ITA countervailing duty determination. We disagree. Under 28 U.S.C. § 1581(c) and 19 U.S.C. § 1516a, the procedural correctness of a countervailing duty determination, as well as the merits, are subject to judicial

review. *Montgomery Ward & Co.* v. *Zenith Radio Corp.*, 673 F.2d 1254, 1260 (CCPA), *cert. denied*, 459 U.S. 943 (1982); *see American Air Parcel*, 718 F.2d at 1551 ("[T]he issue of violation of a regulation can be raised in a protest and subsequent civil action [under 28 U.S.C. § 1581(a)].").

Moreover, as the Court of International Trade said in *Miller I*, 598 F. Supp. at 1128, Miller's challenge to the period for which the ITA may assess excess duties pursuant to its countervailing duty order involves a legal conclusion. As such it is specifically reviewable under 19 U.S.C. § 1516a(a)(2)(A) and, therefore, under 28 U.S.C. § 1581(c). It is undisputed, however, that Miller did not participate in the administrative proceedings in the ITA, and thus, under 19 U.S.C. § 1516a(2)(A) and 28 U.S.C. § 2631(c), Miller did not have standing to bring an action under 28 U.S.C. § 1581(c).

II. Manifest Inadequacy

Lacking standing to bring its action under § 1581(c), Miller bears the burden of establishing its standing to bring its action under § 1581(i), and, to do that, it must show that if it had availed itself of the remedy under § 1581(c), that remedy would have been manifestly inadequate.

Miller says it has suffered "the illegal deprivation of its property and resulting harm arising from the unlawful exercise of government authority." However, mere allegations of financial harm, or assertions that an agency failed to follow a statute, do not make the remedy established by Congress manifestly inadequate. *American Air Parcel*, 718 F.2d at 1550-51.

Persuasive of the adequacy of the § 1581(c) remedy is that another importer of Brazilian pig iron used it. In *Philipp Bros., Inc.* v. *United States*, 630 F. Supp. 1317 (Ct. Int'l Trade 1986), *appeal dismissed*, No. 86-1122 (Fed. Cir. July 18, 1986), an importer who had participated in the ITA proceedings, 630 F. Supp. at 1320 n.3, brought

an action under 28 U.S.C. § 1581(c) challenging the ITA's final determination. Among the importer's arguments was the one Miller makes here, that the ITA lacked authority to enforce its final determination because it did not complete its review within the statutory time period. 630 F. Supp. at 1323-24. That the Court of International Trade decided that issue adversely to the importer does not make a § 1581(c) cause of action manifestly inadequate.

CONCLUSION

Because Miller did not participate as a party in the ITA proceeding, it lacked standing to invoke the jurisdiction granted the Court of International Trade under 28 U.S.C. § 1581(c). Miller's action falls clearly under § 1581(c). Because Miller has not shown the remedy available under § 1581(c) to be manifestly inadequate, Miller has failed to establish its standing to invoke the jurisdiction granted the Court of International Trade under 28 U.S.C. § 1581(i).

Accordingly, we affirm the dismissal of Miller's complaint.

AFFIRMED

Slip Op. 86-110

UNITED STATES COURT OF INTERNATIONAL TRADE

MILLER AND COMPANY,	: Court No. 84-4-00576
Plaintiff,	:
v.	:
THE UNITED STATES,	:
Defendant.	:

[Dismissed.]

Decided: October 24, 1986

Plaia & Schaumberg, Chartered (*Herbert C. Shelley* and *Joel D. Kaufman*), for plaintiff.

Richard K. Willard, Assistant Attorney General, *David M. Conen,* Director, Commercial Litigation Branch, and *Elizabeth C. Seastrum,* Civil Division, United States Department of Justice, for defendant.

OPINION

RESTANI, Judge: This action challenges a determination upon the annual review of a countervailing duty order regarding Brazilian pig iron. The year under review was 1981. In this court's previous opinion in this matter, *Miller and Co.* v. *United States,* 8 CIT 281, 598 F. Supp. 1126 (1984), this court determined that no jurisdiction existed for an action under 28 U.S.C. § 1581 (c) (1982) inasmuch as plaintiff did not participate in the underlying administrative proceedings. *See* 19 U.S.C. § 1516a(a)(2)(A) (1982) (participation made a prerequisite to suit). The only possible jurisdictional basis remaining for suit is 28 U.S.C. § 1581(i) (1982), the residual jurisdiction of the court. In the

court's previous opinion, the court determined that such jurisdictional basis would be proper only if defendant's actions were patently *ultra vires*, so that plaintiff could not be expected to participate administratively. The court found it could not make such a determination without briefing on the merits of the action. *Miller*, 8 CIT at 286, 598 F. Supp. at 1131.

This matter has now been briefed fully. In the interim, *however*, two cases have been decided which shed light on this matter, and which lead to the conclusion that the defendant did not act in an *ultra vires* manner in issuing the challenged determination. The first is *Ambassador Division of Florsheim Shoes*, 748 F.2d 1560 (Fed. Cir. 1984). The second is *Philipp Bros., Inc.* v. *United States*, 10 CIT ___, 630 F. Supp.. 1317 (1986), *appeal dismissed*, No. 86-1122 (Fed. Cir. July 18, 1986).

In *Florsheim*, the Federal Circuit determined that suspension of liquidation pending completion of the relevant annual review was required by the countervailing duty laws. The court in *Philipp Bros.* found that such a suspension does not terminate prior to completion of the review, even if the Commerce Department does not complete its review within the statutorily directed time. *See* 19 U.S.C. § 1675(a) (1982) (review to be completed "[a]t least once during each 12-month period beginning on the anniversary of the date of publication of a countervailing duty order").[1] In essence, the court found that the time limits of § 1675(a) are not jurisdictional,[2] and that gov-

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[1] 19 U.S.C. § 1675(a) was amended in 1984 to make annual reviews necessary only upon request. Trade and Tariff Act of 1984, Pub. Law 98-573, § 611(a)(2)(A), 98 Stat. 3031 (1984).

[2] A suit to compel timely action may be the appropriate response to failure to comply with 19 U.S.C. § 1675(a). *American Permac, Inc.* v. *United States*, 10 CIT ___, Slip Op. 86-83 (August 12, 1986); *see also UST, Inc.* v. *United States*, 10 CIT ___, Slip Op. 86-100 at 12 (October 10, 1986) (citing *Philipp Bros.*).

ernmental delay alone does not preclude completion of the administrative process. Furthermore, because a statutorily required suspension was in effect, the court found that 19 U.S.C. § 1504 (1982) did not prevent imposition of additional duties by effecting a liquidation by operation of law.[3] Plaintiff has raised no arguments which convince the court that *Philipp Bros.* is in error. *Philipp Bros.* flows directly from *Florsheim.* There is no way to distinguish this case from *Philipp Bros.* on this point. *Stare decisis* applies. Thus, the court concludes that Commerce did not act beyond its authority here.

Accordingly, the court finds that there is no jurisdiction for this action under 28 U.S.C. § 1581(i) and it is dismissed.

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[3] Liquidation is the term for the finalization of the duty assessment process. 19 U.S.C. § 1504 (1982) read in relevant part:

> **(a) Liquidation**
>
> Except as provided in subsection (b) of this section, an entry of merchandise not liquidated within one year from:
>
> • • •
>
> shall be deemed liquidated at the rate of duty, value, quantity, and amount of duties asserted at the time of entry by the importer, his consignee, or agent. . . .
>
> **(b) Extension**
>
> The Secretary may extend the period in which to liquidate an entry by giving notice of such extension to the importer, his consignee, or agent in such form and manner as the Secretary shall prescribe in regulations, if—
>
> • • •
>
> (2) liquidation is suspended as required by statute or court order;
>
> • • •
>
> Later amendments to this provision are irrelevant to the issues at hand.

/s/ JANE A RESTANI
JANE A. RESTANI
JUDGE

Dated: New York, New York
This 24 day of October, 1986.

JUDGMENT

UNITED STATES COURT OF INTERNATIONAL TRADE

JANE A. RESTANI, JUDGE

MILLER AND COMPANY,	:	
Plaintiff,	:	Court No. 84-4-00576
v.	:	
THE UNITED STATES,	:	
Defendant.	:	

This case having been duly submitted for decision and the Court, after due deliberation, having rendered a decision herein; now, in conformity with said decision,

IT IS HEREBY ORDERED: that this action is dismissed.

/s/ JANE A. RESTANI
JANE A. RESTANI
JUDGE

Dated: New York, New York
This 24 day of October, 1986.

Slip Op. 84-125

UNITED STATES COURT OF INTERNATIONAL TRADE

MILLER AND COMPANY,	:	
Plaintiff,	:	
v.	:	Before: RESTANI, JUDGE
THE UNITED STATES,	:	Court No. 84-4-00576
Defendant.	:	

Opinion and Order

[Plaintiff's motion to amend the summons is denied.]

Decided: November 21st, 1984

Plaia, Schaumberg & deKieffer, Chartered (Herbert C. Shelley and *George W. Thompson*), for the plaintiff.

Richard K. Willard, Acting Assistant Attorney General; *David M. Cohen,* Director, Commercial Litigation Branch; *Francis J. Sailer;* Civil Division, United States Department of Justice, for the defendant.

RESTANI, Judge: Plaintiff filed an action challenging the final determination made by the International Trade Administration ("ITA") of the United States Department of Commerce at the conclusion of its periodic review, conducted pursuant to section 751 of the Tariff Act of 1930, as amended, 19 U.S.C. §1675 (1982), of the outstanding countervailing duty order on pig iron imported from Brazil. Plaintiff, an importer, seeks an injunction directing the ITA not to order liquidation of plaintiff's Brazilian pig iron entries for 1981 in the manner set forth in the ITA's section 751 determination.

The countervailing duty order in this action was published in the Federal Register on April 4, 1980 (45 Fed. Reg. 23045). The preliminary results of the ITA's administrative review for 1981 of this countervailing duty order were published in the Federal Register on November 30, 1983 (48 Fed. Reg. 54091), and the final results were published on March 16, 1984 (49 Fed. Reg. 9923). The ITA instructed the Customs Service to assess countervailing duties in excess of the crash deposits paid on account of duties on 1981 imports of Brazilian pig iron.

This case is before the court on plaintiff's motion to amend its summons and on defendant's alternative motions for dismissal or summary judgment.[1] Plaintiff seeks amendment of its summons to include an assertion of jurisdiction under 28 U.S.C. §1581(c) (1982).[2] Plaintiff's orig-

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[1] Plaintiff's motion for summary judgment is based on the jurisdictional and standing issues raised in its motion to dismiss.

[2] 28 U.S.C. §1581(c) reads as follows:

> The Court of International Trade shall have exclusive jurisdiction of any civil action commenced under section 516A of the Tariff Act of 1930.

Section 516A of the Tariff Act of 1930, 19 U.S.C. §1516a (1982) reads in relevant part:

> **(a) Review of determination**
>
> . . . **(2) Review of determinations on record.**
>
> **(A) In general.**—Within thirty days after the date of publication in the Federal Register of—
>
> (i) notice of any determination described in clause (ii) (iii), (iv), or (v) of subparagraph (B), or
>
> (ii) an antidumpting or countervailing duty order based upon any determination described in clause (i) of subparagraph (B),
>
> an interested party who is a party to the proceeding in connection with which the matter arises may commence an action in the United States Court of International Trade by filing a summons, and within thirty days thereafter a complaint, each with the content and in the

inal complaint alleged jurisdiction under 28 U.S.c. §1581(i) (1982).[3] Defendant opposes the motion to amend and moves for dismissal on the grounds that (1) plaintiff lacks standing to prosecute this action and (2) the court lacks subject matter jurisdiction over this action.

The first issue is whether plaintiff's motion to amend should be permitted. Resolution of this issue will depend on whether or not plaintiff's suit lies under 19 U.S.C. §1516a(a)(2) (1982), which is referenced in 28 U.S.C. §1581(c). Plaintiff challenges the scope of a final countervailing duty order. The question of the period for which the ITA may assess excess duties pursuant to its countervailing duty order involves a legal conclusion. "[F]actual

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form, manner, and style prescribed by the rules of that court, contesting any factual findings or legal conclusions upon which the determination is based.

(B) Reviewable determinations.—The determinations which may be contested under subparagraph (A) are as follows:

. . . (iii) A determination, other than a determination reviewable under paragraph (1), by the Secretary, the administering authority, or the Commission under section 1675 of this title.

[3] 28 U.S.C. §1581(i) provides:

(i) In addition to the jurisdiction conferred upon the Court of International Trade by subsections (a)-(h) of this section and subject to the exception set forth in subsection (j) of this section, the Court of International Trade shall have exclusive jurisdiction of any civil action commenced against the United States, its agencies, or its officers, that arises out of any law of the United States providing for—

(1) revenue from imports or tonnage;

tariffs, duties, fees, or other taxes on the importation of merchandise for reasons other than the raising of revenue;

(3) embargoes or other quantitative restrictions on the importation of merchandise for reasons other than the protection of the public health or safety; or

(4) administration and enforcement with respect to matters referred to in paragraphs (1)-(3) of this subsection and subsections (a)-(h) of this section.

findings or legal conclusions upon which" countervailing duty orders are based are specifically reviewable under §1516a(a)(2)(A). Plaintiff's suit, therefore, would appear to lie under §1581(c).

A suit may be brought under §1581(c), however, only by "an interested party who is a party to the proceeding in connection with which the matter arises." 19 U.S.C. §1516a(a)(2)(A). Plaintiff may be "an interested party," but plaintiff was not a party to the administrative proceeding out of which this action arises. Unlike the plaintiff in *FirstMiss, Inc.* v. *United States*, ___ CIT ___, Slip Op. 84-14 (March 6, 1984) (cited by plaintiff), plaintiff here does not point to a particular employee or agent who represented it in the agency proceedings, nor can it point to any reason why the ITA should have realized that it was participating in those particular proceedings. Absent these factors, it is irrelevant whether or not plaintiff's failure to participate prejudiced defendant or whether plaintiff's participation would have been futile. It is not enough that some of the participants have the same general interest as plaintiff. Under the statutory scheme plaintiff itself must participate. Thus, it appears that if this action must be brought under §1581(c), it may not be maintained by plaintiff, because plaintiff did not participate in the relevant administrative proceedings. *Cf. Matsushita Electric Industrial Co.* v. *United States*, 2 CIT 254, 257-58, 529 F.Supp. 664, 668-69 (1981). Accordingly, plaintiff's motion to amend the summons in this action is denied.

The second issue is whether jurisdiction over this action exists under 28 U.S.C. §1581(i). Although it did not deal specifically with §1581(c) as it relates to §1581(i), the case of *United States* v. *Uniroyal, Inc.*, 69 CCPA 179, 687 F.2d 467 (1982), makes it quite clear that 28 U.S.C. §1581(i) may not be used to circumvent the specific requirements of jurisdiction under §1581(a)-(h). If §1581(c) provides an adequate avenue of relief, plaintiff may not proceed under §1581(i). It appears to the court that at one point in time

plaintiff could have taken steps to qualify its action for jurisdiction under §1581(c), but it is not clear that plaintiff must have done so in order to obtain relief now, as the court will discuss. If plaintiff is not required in this instance to proceed under §1581(c) exclusively, §1581(i) will provide an avenue of relief.[4]

Analysis of this matter begins with the proposition that one who has been injured by agency action is presumptively entitled to judicial review. *City of Rochester* v. *Bond*, 603 F.2d 927, 931 (D.C. Cir. 1979); Administrative Procedure Act §10(a), 5 U.S.C. §702 (1982). *See Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 140-41 (1967); *see also* K. Davis, *Administrative Law Treatise* §28.08 (Supp. 1970); L. Jaffe, *Judicial Control of Administrative Action* 336 (1965). When Congress provides a specific statutory procedure for judicial review of administrative action, "it is *ordinarily* supposed that Congress intended that procedure to be the exclusive means of obtaining judicial review in those cases to which it applies." *City of Rochester*, 603 F.2d at 931 (footnote omitted) (emphasis added). Generally, this means that a plaintiff must exhaust its administrative remedies before it can seek such review. *Lowa, Ltd.* v. *United States*, ___ CIT ___, 561 F.Supp. 441, 448, *aff'd*, 724 F.2d 121 (1983). On the other hand, when there is substantial doubt as to whether Congress intended to require strict exhaustion of administrative remedies in a par-

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[4] When there is no specific statutory scheme for administrative and judicial review, §1581(i) provides this court with jurisdiction over most international trade disputes. The broad grant of jurisdiction found in §1581(i) is not easily defeated:

> Unless these preceding jurisdictional subsections [1581(a)-(h)] express or contain in their manifest legislative history, a limitation on jurisdiction of other related actions, they do not operate to diminish the broad grant of jurisdiction contained in section 1581(i).

Sacilor, Acieries et Laminoirs de Lorraine v. *United States*, 3 CIT 191, 193, 542 F.Supp. 1020, 1023 (1982).

ticular case, the court must lean towards permitting judicial review even absent complete exhaustion. *Block* v. *Community Nutrition Institute*, 104 S. Ct. 2450, 2457 (1984).

The question here is whether Congress intended §1581(i) to serve as an avenue of relief in certain instances of failure to comply with the exhaustion prerequisites to §1581(c) relief. The court must assume that Congress was aware of the judicial precedents in this area and that it intended them to be applicable to this court's interpretation of its jurisdictional mandate. *See Johnson* v. *First National Bank of Montevideo, Minnesota*, 719 F.2d 270, 277 (8th Cir.), *cert. denied*, 104 S. Ct. 1015 (1984). Although statutory exhaustion requirements, such as that made applicable under §1581(c),[5] are generally prerequisites to obtaining judicial review, in rare instances courts have recognized exceptions to these requirements. *See generally American Trucking Associations, Inc.* v. *I.C.C.*, 673 F.2d 82, 85 n.4 (5th Cir. 1982), *cert. denied*, 103 S. Ct. 1272 (1983) (judicial review available when non-party to agency proceeding attacks agency authority or constitutionality of agency's enabling statute). In the international trade area see *Luggage and Leather Goods Manufacturers of America* v. *United States*, ___ CIT ___, Slip Op. 84-53, 15-18 (May 11, 1984) (plaintiffs not required to pursue "manifestly inadequate" or "inappropriate administrative remedy" prior to seeking judicial review); *United States Cane Sugar Refiners' Association, etc.* v. *Block*, 69 CCPA 172, 175 n.5, 683 F.2d 399, 402 n.5 (1982) (because of potential for immediate injury and irreparable harm to an industry and a substantial impact on the national economy, plaintiff not required to exhaust administrative remedy). This case presents a situation in which a general exception to the exhaustion rule may be applicable here. If such an

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[5] Participation in the relevant administrative proceedings as specified in 19 U.S.C. §1516a(a)(2) is a form of exhaustion of administrative remedies.

exception exists it would provide the extraordinary reason for allowing plaintiff to proceed under 28 U.S.C. §1581(i) in a case where plaintiff could have taken steps to qualify for §1581(c) jurisdiction.

Courts have original jurisdiction to review administrative actions when a plaintiff alleges that an agency has exceeded its statutory powers. *Skinner & Eddy Corp.* v. *United States,* 249 U.S. 557, 562 (1919). This exception to the rule of exhaustion has been repeatedly observed by the Supreme Court and lower courts. *Leedom* v. *Kyne,* 358 U.S. 184, 188 (1958); *Hines* v. *United States,* 263 U.S. 143, 147 (1923); *American Trucking,* 673 F.2d at 85 n.4; *City of Rochester,* 603 F.2d at 934 n.32; *Schwartz* v. *Allegheny Corp.,* 282 F.Supp. 161, 163 (S.D.N.Y. 1968) (three-judge dist. ct.). In the instant case, plaintiff argues that it is challenging the administrative agency's exercise of its power. Plaintiff asserts that Commerce did not act in the timely manner allegedly mandated by 19 U.S.C. §1675 and was therefore without power to review and retroactively assess countervailing duties on 1981 entries.[6] Plaintiff further asserts that Commerce's retroactive assessment of countervailing duties is contrary to law and is in direct

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[6] 19 U.S.C. § 1675 provides in relevant part:

§ 1675. Administrative review of determinations

(a) Periodic review of amount of duty.

> **(1) In general.**—At least once during each 12-month period beginning on the anniversary of the date of publication of a countervailing duty order under this subtitle or under section 1303 of this title, an antidumping duty order under this subtitle or a finding under the Antidumping Act, 1921, or a notice of the suspension of an investigation, the administering authority, after publication of notice of such review in the Federal Register, *shall*—
>
> (A) review and determine the amount of any net subsidy,
>
> . . .

(emphasis added).

opposition to this court's ruling in *Ambassador Division of Florsheim Shoe Co.* v. *United States*, ___ CIT ___, 577 F.Supp. 1016 (1983), *appeal docketed*, No. 84-814 (Fed. Cir. Jan. 27, 1984).[7]

Mere challenge to the validity of an administrative ruling as beyond the power of the agency is not enough to excuse the exhaustion of administrative remedies. Plaintiff must allege a patent violation of agency authority. *Leedom* v. *Kyne*, 358 U.S. 184, 189 (1958). "[W]hen Congress has specified a procedure for judicial review of administrative action, that procedure is the exclusive means of review unless, because of some extraordinary circumstances, the procedure fails to provide an adequate remedy .... Those extraordinary circumstances ... were instances of agency action which is *ultra vires* ....'" *Independent Cosmetic Manufacturers and Distributors, Inc.* v. *H.E.W.*, 574 F.2d 553, 554 (D.C. Cir.), *cert. denied*, 439 U.S. 893 (1978). *United Parcel Service, Inc.* v. *U.S. Postal Service*, 524 F.Supp. 1235, 1247 (D. Del. 1981). Clearly, if the ITA's actions were patently *ultra vires* it would be inappropriate to require plaintiff to appear before it as a prerequisite to judicial review.

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[7] The Federal Register notice of the final countervailing duty order contested here states:

> *Comment 1:* The Government of Brazil argues that, in accordance with the Court of International Trade's decision in *The Ambassador Division of Florsheim Shoes Co.* v. *United States*, No. 83-125 (C.I.T., December 1, 1983), the Department has no authority to collect countervailing duties on entries subject to the review greater than the cash deposits on those entries. The Brazilian government further argues that the results of a section 751 review should only apply to future entries.
>
> *Department's Position:* We disagree. The Department has appealed the *Florsheim* decision. The Department believes that its practice of retroactive collection is correct and will continue to operate on that belief pending the outcome of the appeal

49 Fed. Reg. 9924 (March 16, 1984).

The court finds, however, that it cannot determine at this time whether plaintiff has alleged a "patent violation" of agency authority. This question is so intertwined with the merits of this matter that a decision on jurisdiction must be reserved. Therefore, the parties are directed to proceed pursuant to the rules of this court to bring the issues raised by plaintiff before the court for decision. The court will then determine whether jurisdiction to hear this action exists under 28 U.S.C. §1581(i).

Accordingly, decision on defendant's motion to dismiss and its alternative motion for summary judgment is reserved.

/s/ JANE A. RESTANI
JANE A. RESTANI
JUDGE

Dated: New York, New York

This 21st day of November, 1984.

19 U.S.C. § 1504. Limitation on Liquidation

(a) Liquidation.—Except as provided in subsection (b) of this section, an entry of merchandise not liquidated within one year from:

(1) The date of entry of such merchandise:

(2) the date of the final withdrawal of all such merchandise covered by a warehouse entry; or

(3) the date of withdrawal from warehouse of such merchandise for consumption where, pursuant to regulations issued under section 1505(a) of this title, duties may be deposited after the filing of an entry or withdrawal from warehouse:

shall be deemed liquidated at the rate of duty, value, quantity, and amount of duties asserted at the time of entry by the importer, his consignee, or agent. Notwithstanding

section 1500(e) of this title, notice of liquidation need not be given of any entry deemed liquidated.

(b) Extension.—The Secretary may extend the period in which to liquidate an entry by giving notice of such extension to the importer, his consignee, or agent in such form and manner as the Secretary shall prescribe in regulations, if—

(1) information needed for the proper appraisement or classification of the merchandise is not available to the appropriate customs officer;

(2) liquidation is suspended as required by statute or court order; or

(3) the importer, consignee, or his agent requests such extension and shows good cause therfor.

(c) Notice of suspension.—If the liquidation of any entry is suspended, the Secretary shall, by regulation, require that notice of such suspension by provided to the importer or consignee concerned and to any authorized agent and surety of such importer or consignee.

(d) Limitation.—Any entry of merchandise not liquidated at the expiration of four years from the applicable date specified in subsection (a) of this section, shall be deemed liquidated at the rate of duty, value, quantity, and amount of duty asserted at the time of entry by the importer, his consignee, or agent, unless liquidation continues to be suspended as required by statute or court order. When such a suspension of liquidation is removed, the entry shall be liquidated within 90 days therefrom.

June 17, 1930, c. 497, Title IV, § 504, as added Oct. 3, 1978, Pub.L. 95-410, Title II, § 209(a), 92 Stat. 902.

19 U.S.C. § 1675. Administrative review of determinations

(a) Periodic review of amount of duty.—

(1) In general.—At least once during each 12-month period beginning on the anniversary of the date of pub-

lication of a countervailing duty order under this subtitle or under section 1303 of this title, an antidumping duty order under this subtitle or a finding under the Antidumping Act, 1921, or a notice of the suspension of an investigation, the administering authority, after publication of notice of such review in the Federal Register, shall—

(A) review and determine the amount of any net subsidy,

(B) review, and determine (in accordance with paragraph (2)), the amount of any antidumping duty, and

(C) review the current status of, and compliance with, any agreement by reason of which an investigation was suspended, and review the amount of any net subsidy or margin of sales at less than fair value involved in the agreement,

and shall publish the results of such review, together with notice of any duty to be assessed, estimated duty to be deposited, or investigation to be resumed in the Federal Register.

(2) Determination of antidumping duties.—For the purpose of paragraph (1)(B), the administering authority shall determine—

(A) the foreign market value and United States price of each entry of merchandise subject to the antidumping duty order and included within that determination, and

(B) the amount, if any, by which the foreign market value of each such entry exceeds the United States price of the entry.

The administering authority, without revealing confidential information, shall publish notice of the results of the determination of antidumping duties in the Federal Register, and that determination shall be the basis for the assess-

ment of antidumping duties on entries of the merchandise included within the determination and for deposits of estimated duties.

(b) Reviews upon information or request.—

(1) In general.—Whenever the administering authority or the Commission receives information concerning, or a request for the review of an agreement accepted under section 1671c or 1673c of this title or an affirmative determination made under section 1671c(h)(2), 1671d(a), 1671d(b), 1673c(h)(2), 1673d(a), or 1673d(b) of this title, which shows changed circumstances sufficient to warrant a review of such determination, it shall conduct such a review after publishing notice of the review in the Federal Register. In reviewing its determination under section 1671c(h)(2) or 1673c(h)(2) of this title, the Commission shall consider whether, in the light of changed circumstances, an agreement accepted under section 1671c(c) or 1673c(c) of this title continues to eliminate completely the injurious effects of imports of the merchandise.

(2) Limitation on period for review.—In the absence of good cause shown—

(A) the Commission may not review a determination under section 1671(b) or 1673(b) of this title, and

(B) the administering authority may not review a determination under section 1671d(a) or 1673(a) of this title, or the suspension of an investigation suspended under section 1671c or 1673c of this title.

less than 24 months after the date of publication of notice of that determination or suspension.

(c) Revocation of countervailing duty order or antidumping duty order.—The administering authority may revoke, in whole or in part, a countervailing duty order or an antidumping duty order, or terminate a suspended

investigation, after review under this section. Any such revocation or termination shall apply with respect to unliquidated entries of merchandise entered, or withdrawn from warehouse, for consumption on and after a date determined by the administering authority.

(d) Hearings.—Whenever the administering authority or the Commission conducts a review under this section it shall, upon the request of any interested party, hold a hearing in accordance with section 1677c(b) of this title in connection with that review.

(e) Determination that basis for suspension not longer exists.—If the determination of the Commission under the last sentence of subsection (b)(1) of this section is negative, the agreement shall be treated as not accepted, beginning on the date of the publication of the Commission's determination, and the administering authority and the Commission shall proceed, under section 1671c(i) or 1673c(i) of this title, as if the agreement had been violated on that date, except that no duty under any order subsequently issued shall be assessed on merchandise entered, or withdrawn from warehouse, for consumption before that date. June 17, 1930, c. 497, Title VII, § 751, as added July 26, 1979, Pub.L. 96-39, Title I, § 101, 93 Stat. 175.

28 U.S.C. § 1581. Civil actions against the United States and agencies and officers thereof

(a) The Court of International Trade shall have exclusive jurisdiction of any civil action commenced to contest the denial of a protest, in whole or in part, under section 515 of the Tariff Act of 1930.

(b) The Court of International Trade shall have exclusive jurisdiction of any civil action commenced under section 516 of the Tariff Act of 1930.

(c) The Court of International Trade shall have exclusive jurisdiction of any civil action commenced under section 516A of the Tariff Act of 1930.

(d) The Court of International Trade shall have exclusive jurisdiction of any civil action commenced to review—

(1) any final determination of the Secretary of Labor under section 223 of the Trade Act of 1974 with respect to the eligibility of workers for adjustment assistance under such Act;

(2) any final determination of the Secretary of Commerce under section 251 of the Trade Act of 1974 with respect to the eligibility of a firm for adjustment assistance under such Act; and

(3) any final determination of the Secretary of Commerce under section 271 of the Trade Act of 1974 with respect to the eligibility of a firm for adjustment assistance under such Act; and

(e) The Court of International Trade shall have exclusive jurisdiction of any civil action commenced to review any final determination of the Secretary of the Treasury under section 3051(b)(1) of the Trade Agreements Act of 1979.

(f) The Court of International Trade shall have exclusive jurisdiction of any civil action involving an application for an order directing the administering authority or the International Trade Commission to make confidential information available under section 777(c)(2) of the Tariff Act of 1930.

(g) The Court of International Trade shall have exclusive jurisdiction of any civil action commenced to review—

(1) any decision of the Secretary of the Treasury to deny a customs broker's license under section 641(b)(2) or (3) of the Tariff Act of 1930, or to deny a customers broker's permit under section 641(c)(1) of such Act, or to revoke a license or permit under section 641(b)(5) or (c)(2) of such Act; and

(2) any decision of the Secretary of the Treasury to revoke or suspend a customs broker's license or permit,

or impose a monetary penalty in lieu thereof, under section 641(d)(2)(B) of the Tariff Act of 1930.

(h) The Court of International Trade shall have exclusive jurisdiction of any civil action commenced to review, prior to the importation of the goods involved, a ruling issued by the Secretary of the Treasury, or a refusal to issue or change such a ruling, relating to classification, valuation, rate of duty, marking, restricted merchandise, entry requirements, drawbacks, vessel repairs, or similar matters, but only if the party commencing the civil action demonstrates to the court that he would be irreparably harmed unless given an opportunity to obtain judicial review prior to such importation.

(i) In addition to the jurisdiction conferred upon the Court of International Trade by subsections (a)-(h) of this section and subject to the exception set forth in subsection (j) of this section, the Court of International Trade shall have exclusive jurisdiction of any civil action commenced against the United States, its agencies, or its officers, that arises out of any law of the United States providing for—

(1) review from imports or tonnage;

(2) tariffs, duties, fees, or other taxes on the importation of merchandise for reasons other than the raising of revenue;

(3) embargoes or other quantitative restrictions on the importation of merchandise for reasons other than the protection of the public health or safety; or

(4) administration and enforcement with respect to the matters referred to in paragraphs (1)-(3) of this subsection and subsections (a)-(h) of this section.

(j) The Court of International Trade shall not have jurisdiction of any civil action arising under section 305 of the Tariff Act of 1930.

(Added Pub.L. 96-417, Title II, § 201, Oct. 10, 1980, 94 Stat. 1728, and amended Pub.L. 98-573, Title II, § 212(b)(1), Oct. 30, 1984, 98 Stat. 2983; Pub.L. 99-514, Title XVIII, § 1891(1), Oct. 22, 1986, 100 Stat. 2926.)

19 C.F.R. § 355.10 Administrative review of orders and suspension agreements.

(d) *Automatic assessment of duties.* For orders, if the Secretary does not receive a timely request under paragraph (a)(1) or (a)(2) of this section, the Secretary, without additional notice, will instruct the Customers Service to assess countervailing duties on the merchandise described in paragraphs (b)(1) through (b)(3) of this section at rates equal to the cash deposit of (or bond for) estimated countervailing duties required on that merchandise at the time of entry, or withdrawal from warehouse, for consumption and to continue to collect the cash deposit previously ordered.
[50 FR 32559. Aug. 13, 1985]

19 C.F.R. § 355.41 Administrative review of determinations.

(a) *In general.* At least once during each 120month period beginning on the anniversary of the date a Countervailing Duty Order or notice of the suspension of an investigation is published, the amount of any net subsidy or the status of, and compliance with, any agreement by reason of which an investigation was suspended, shall be redetermined.

PUBLIC LAW 96-417 [S. 1654]: October 10, 1980

CUSTOMS COURTS ACT OF 1980

For Legislative History of this and other Laws, see Table 1, Public Laws and Legislative History, at end of final volume

An Act to improve the Federal judicial machinery by clarifying and revising certain provisions of tile 28, United States Code, relating to the judiciary and judicial review of international trade matters, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Customs Courts Act of 1980".

TITLE I—COMPOSITION OF THE COURT OF INTERNATIONAL TRADE AND ASSIGNMENT OF JUDGES TO OTHER COURTS

COMPOSITION OF COURT

Sec. 101. Section 251 of title 28, United States Code, is amended to read as follows:

"§251. Appointment and number of judges; offices

"(a) The President shall appoint, by and with the advice and consent of the Senate, nine judges who shall constitute a court of record to be known as the United States Court of International Trade. Not more than five of such judges shall be from the same political party. The court is a court established under article III of the Constitution of the United States.

"(b) The President shall designate one of the judges of the Court of International Trade who is less than seventy years of age to serve as chief judge. The chief judge shall continue to serve as chief judge until he reaches the age of seventy years and another judge is designated as chief judge by the President. After the designation of another judge to serve as chief judge, the former chief judge may continue to serve as a judge of the court.

"(c) The offices of the Court of International Trade shall be located in New York, New York.".

ASSIGNMENT OF JUDGES

Sec. 102. (a) Section 293(b) of title 28, United States Code, is amended by striking out "Customs Court" and

all that follows through "need arises" and inserting in lieu thereof "Court of International Trade to perform judicial duties in any circuit, either in a court of appeals or district court, upon presentation of a certificate of necessity by the chief judge or circuit justice of the circuit in which the need arises".

(b) Section 293(d) of title 28, United States Code, is amended to read as follows:

"(d) The chief judge of the Court of International Trade may, upon presentation to him of a certificate of necessity by the chief judge of the Court of Customs and Patent Appeals or the chief judge of the Court of Claims, designate and assign temporarily any judge of the Court of International Trade to serve as a judge of the Court of Customs and Patent Appeals or the Court of Claims.".

TITLE II—JURISDICTION OF THE COURT OF INTERNATIONAL TRADE

JURISDICTION OF THE COURT

Sec. 201. Chapter 95 of title 28, United States Code, is amended to read as follows:

"CHAPTER 95—COURT OF INTERNATIONAL TRADE

"Sec.
"1581. Civil actions against the United States and agencies and officers thereof.
"1582. Civil actions commenced by the United States.
"1583. Counterclaims, cross-claims, and third-party actions.
"1584. Cure of defects.
"1585. Powers in law and equity.

"§ 1581. Civil actions against the United States and agencies and officers thereof

"(a) The Court of International Trade shall have exclusive jurisdiction of any civil action commenced to contest the denial of a protest, in whole or in part, under section 515 of the Tariff Act of 1930.

"(b) The Court of International Trade shall have exclusive jurisdiction of any civil action commenced under section 516 of the Tariff Act of 1930.

"(c) The Court of International Trade shall have exclusive jurisdiction of any civil action commenced under section 516A of the Tariff Act of 1930.

"(d) The Court of International Trade shall have exclusive jurisdiction of any civil action commenced to review—

"(1) any final determination of the Secretary of Labor under section 223 of the Trade Act of 1974 with respect to the eligibility of workers for adjustment assistance under such Act;

"(2) any final determination of the Secretary of Commerce under section 251 of the Trade Act of 1974 with respect to the eligibility of a firm for adjustment assistance under such Act; and

"(3) any final determination of the Secretary of Commerce under section 271 of the Trade Act of 1974 with respect to the eligibility of a community for adjustment assistance under such Act.

"(e) The Court of International Trade shall have exclusive jurisdiction of any civil action commenced to review any final determination of the Secretary of the Treasury under section 305(b)(1) of the Trade Agreements Act of 1979.

"(f) The Court of International Trade shall have exclusive jurisdiction of any civil action involving any application

for an order directing the administering authority or the International Trade Commission to make confidential information available under section 777(c)(2) of the Tariff Act of 1930.

"(g) The Court of International Trade shall have exclusive jurisdiction of any civil action commenced to review—

"(1) any decision of the Secretary of the Treasury to deny or revoke a customhouse broker's license under section 641(a) of the Tariff Act of 1930; and

"(2) any order of the Secretary of the Treasury to revoke or suspend a customhouse broker's license under section 641(b) of the Tariff Act of 1930.

"(h) The Court of International Trade shall have exclusive jurisdiction of any civil action commenced to review, prior to the importation of the goods involved, a ruling issued by the Secretary of the Treasury, or a refusal to issue or change such a ruling, relating to classification, valuation, rate of duty, marking, restricted merchandise, entry requirements, drawbacks, vessel repairs, or similar matters, but only if the party commencing the civil action demonstrates to the court that he would be irreparably harmed unless given an opportunity to obtain judicial review prior to such importation.

"(i) In addition to the jurisdiction conferred upon the Court of International Trade by subsections (a)-(h) of this section and subject to the exception set forth in subsection (j) of this section, the Court of International Trade shall have exclusive jurisdiction of any civil action commenced against the United States, its agencies, or its officers, that arises out of any law of the United States providing for—

"(1) revenue from imports or tonnage;

"(2) tariffs, duties, fees, or other taxes on the importation of merchandise for reasons other than the raising of revenue;

"(3) embargoes or other quantitative restrictions on the importation of merchandise for reasons other than the protection of the public health or safety; or

"(4) administration and enforcement with respect to the matters referred to in paragraphs (1)-(3) of this subsection and subsections (a)-(h) of this section.

"(j) The Court of International Trade shall not have jurisdiction of any civil action arising under section 305 of the Tariff Act of 1930.

"§ 1582. Civil actions commenced by the United States

"The Court of International Trade shall have exclusive jurisdiction of any civil action which arises out of an import transaction and which is commenced by the United States—

"(1) to recover a civil penalty under section 592, 704(i)(2), or 734(i)(2) of the Tariff Act of 1930;

"(2) to recover upon a bond relating to the importation of merchandise required by the laws of the United States or by the Secretary of the Treasury; or

"(3) to recover customs duties.

"§ 1583. Counterclaims, cross-claims, and third-party actions

"In any civil action in the Court of International Trade, the court shall have exclusive jurisdiction to render judgment upon any counterclaim, cross-claim, or third-party action of any party, if (1) such claim or action involves the imported merchandise that is the subject matter of such civil action, or (2) such claim or action is to recover upon a bond or customs duties relating to such merchandise.

"§ 1584. Cure of defects

"(a) If a civil action within the exclusive jurisdiction of the Court of International Trade is commenced in a district

court of the United States, the district court shall, in the interest of justice, transfer such civil action to the Court of International Trade, where such action shall proceed as if it had been commenced in the Court of International Trade in the first instance.

"(b) If a civil action within the exclusive jurisdiction of a district court, a court of appeals, or the Court of Customs and Patent Appeals is commenced in the Court of International Trade, the Court of International Trade shall, in the interest of justice, transfer such civil action to the appropriate district court or court of appeals or to the Court of Customs and Patent Appeals where such action shall proceed as if it had been commenced in such court in the first instance.

"§ 1585. Powers in law and equity

"The Court of International Trade shall possess all the powers in law and equity of, or as conferred by statute upon, a district court of the United States.".

TITLE III—COURT OF INTERNATIONAL TRADE PROCEDURE

COURT PROCEDURE

SEC. 301. Chapter 169 of title 28, United States Code, is amended to read as follows:

"CHAPTER 169—COURT OF INTERNATIONAL TRADE PROCEDURE

"Sec.
"2631. Persons entitled to commence a civil action.
"2632. Commencement of a civil action.
"2633. Procedure and fees.
"2634. Notice.
"2635. Filing of official documents.
"2636. Time for commencement of action.
"2637. Exhaustion of administrative remedies.
"2638. News grounds in support of a civil action.

"2639. Burden of proof; evidence of value.
"2640. Scope and standard of review.
"2641. Witnesses; inspection of documents.
"2642. Analysis of imported merchandise.
"2643. Relief.
"2644. Interest.
"2645. Decisions.
"2646. Retrial or rehearing.
"2647. Precidence of cases.

"§ 2631. Persons entitled to commence a civil action

"(a) A civil action contesting the denial of a protest, in whole or in part, under section 515 of the Tariff Act of 1930 may be commenced in the Court of International Trade by the person who filed the protest pursuant to section 514 of such Act, or by a surety on the transaction which is the subject of the protest.

"(b) A civil action contesting the denial of a petition under section 516 of the Tariff Act of 1930 may be commenced in the Court of International Trade by the person who filed such petition.

"(c) A civil action contesting a determination listed in section 516A of the Tariff Act of 1930 may be commenced in the Court of International Trade by any interested party who was a party to the proceeding in connection with which the matter arose.

"(d)(1) A civil action to review any final determination of the Secretary of Labor under section 223 of the Trade Act of 1974 with respect to the eligibility of workers for adjustment assistance under such Act may be commenced in the Court of International Trade by a worker, group of workers, certified or recognized union, or authorized representative of such worker or group that applies for assistance under such Act and is aggrieved by such final determination.

"(2) A civil action to review any final determination of the Secretary of Commerce under section 251 of the Trade

Act of 1974 with respect to the eligibility of a firm for adjustment assistance under such Act may be commenced in the Court of International Trade by a firm, or its representative that applies for assistance under such Act and is aggrieved by such final determination, or by any other interested domestic party that is aggrieved by such final determination.

"(3) A civil action to review any final determination of the Secretary of Commerce under section 271 of the Trade Act of 1974 with respect to the eligibility of a community for adjustment assistance under such Act may be commenced in the Court of International Trade by a community that applies for assistance under such Act and is aggrieved by such final determination, or by any other interested domestic party that is aggrieved by such final determination.

"(e) A civil action to review a final determination made under section 305(b)(1) of the Trade Agreements Act of 1979 may be commenced in the Court of International Trade by any person who was a party-at-interest with respect to such determination.

"(f) A civil action involving an application for the issuance of an order directing the administering authority or the International Trade Commission to make confidential information available under section 777(c)(2) of the Tariff Act of 1930 may be commenced in the Court of International Trade by any interested party whose application for disclosure of such confidential information was denied under section 777(c)(1) of such Act.

"(g)(1) A civil action to review any decision of the Secretary of the Treasury to deny or revoke a customhouse broker's license under section 641(a) of the Tariff Act of 1930 may be commenced in the Court of International Trade by the person whose license was denied or revoked.

"(2) A civil action to review any order of the Secretary of the Treasury to revoke or suspend a customhouse bro-

ker's license under section 641(b) of the Tariff Act of 1930 may be commenced in the Court of International Trade by the person whose license was revoked or suspended.

"(h) A civil action described in section 158(h) of this title may be commenced in the Court of International Trade by the person who would have standing to bring a civil action under section 1581(a) of this title if he imported the goods involved and filed a protest which was denied, in whole or in part, under section 515 of the Tariff Act of 1930.

"(i) Any civil action of which the Court of International Trade has jurisdiction, other than an action specified in subsections (a)-(h) of this section, may be commenced in the court by any person adversely affected or aggrieved by agency action within the meaning of section 702 of title 5.

"(j)(1) Any person who would be adversely affected or aggrieved by a decision in a civil action pending in the Court of International Trade may, by leave of court, intervene in such action, except that—

"(A) no person may intervene in a civil action under section 515 or 516 of the Tariff Act of 1930;

"(B) in a civil action under section 516A of the Tariff Act of 1930, only an interested party who was a party to the proceeding in connection with which the matter arose may intervene, and such person may intervene as a matter of right; and

"(C) in a civil action under section 777(c)(2) of the Tariff Act of 1930, only a person who was a party to the investigation may intervene, and such person may intervene as a matter of right.

"(2) In those civil actions in which intervention is by leave of court, the Court of International Trade shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

"(k) In this section—

"(1) 'interested in party' has the meaning given such term in section 771(9) of the Tariff Act of 1930; and

"(2) 'party-at-interest' means—

"(A) a foreign manufacturer, producer, or exporter, or a United States importer, of merchandise which is the subject of a final determination under section 305(b)(1) of the Trade Agreements Act of 1979;

"(B) a manufacturer, producer, or wholesaler in the United States of a like product;

"(C) United States members of a labor organization or other association of workers whose members are employed in the manufacture, production, or wholesale in the United States of a like product; and

"(D) a trade or business association a majority of whose members manufacture, produce, or wholesale a like product in the United States.

"§ 2632. Commencement of a civil action

"(a) Except for civil actions specified in subsections (b) and (c) of this section, a civil action in the Court of International Trade shall be commenced by filing concurrently with the clerk of the court a summons and complaint, with the content and in the form, manner, and style prescribed by the rules of the court.

"(b) A civil action in the Court of International Trade under section 515 or section 516 of the Tariff Act of 1930 shall be commenced by filing with the clerk of the court a summons, with the content and in the form, manner, and style prescribed by the rules of the court.

"(c) A civil action in the Court of International Trade under section 516A of the Tariff Act of 1930 shall be commenced by filing with the clerk of the court a summons or a summons and a complaint, as prescribed in such sec-

tion, with the content and in the form, manner, and style prescribed by the rules of the court.

"(d) The Court of International Trade may prescribe by rule that any summons, pleading, or other paper mailed by registered or certified mail properly addressed to the clerk of the court with the proper postage affixed and return receipt requested shall be deemed filed as of the date of mailing.

§ 2633. Procedure and fees

"(a) A filing fee shall be payable to the clerk of the Court of International Trade upon the commencement of a civil action in such court. The amount of the fee shall be prescribed by the rules of the court, but shall be not less than $5 nor more than the filing fee for commencing a civil action in a district court of the United States. The court may fix all other fees to be charged by the clerk of the court.

"(b) The Court of International Trade shall prescribe rules governing the summons, pleadings, and other papers, for their amendment, service, and filing, for consolidations, severance, suspensions of cases, and for other procedural matters.

"(c) All summons, pleadings, and other papers filed in the Court of International Trade shall be served on all parties in accordance with rules prescribed by the court. When the United States, its agencies, or its officers are adverse parties, service of the summons shall be made upon the Attorney General and the head of the Government agency whose action is being contested. When injunctive relief is sought, the summons, pleadings, and other papers shall also be served upon the named officials sought to be enjoined.

§ 2634. Notice

"Reasonable notice of the time and place of trial or hearing before the Court of International Trade shall be

given to all parties to any civil action, as prescribed by the rules of the court.

§ 2635. Filing of official documents

"(a)(1) Upon service of the summons on the Secretary of the Treasury in any civil action contesting the denial of a protest under section 515 of the Tariff Act of 1930 or the denial of a petition under section 516 of such Act, the appropriate customs officer shall forthwith transmit to the clerk of the Court of International Trade, as prescribed by its rules, and as a part of the official record—

"(A) the consumption or other entry and the entry summary;

"(B) the commercial invoice;

"(C) the special customs invoice;

"(D) a copy of the protest or petition;

"(E) a copy of the denial, in whole or in part, of the protest or petition;

"(F) the importer's exhibits;

"(G) the official and other representative samples;

"(H) any official laboratory reports; and

"(I) a copy of any bond relating to the entry.

"(2) If any of the items listed in paragraph (1) of this subsection do not exist in a particular civil action, an affirmative statement to that effect shall be transmitted to the clerk of the court.

"(b)(1) In any civil action commenced in the Court of International Trade under Section 516A of the Tarriff Act of 1930, within forty days or within such other period of time as the court may specify, after the date of service of a complaint on the administering authority established to administer title VII of the Tarriff Act of 1930 or the United States International Trade Commission, the ad-

ministering authority or the Commission shall transmit to the clerk of the court the record of such action, as prescribed by the rules of the court. The record shall, unless otherwise stipulated by the parties, consist of—

"(A) a copy of all information presented to or obtained by the administering authority or the Commission during the course of the administrative proceedings, including all governmental memoranda pertaining to the case and the record of ex parte meetings required to be maintained by section 777(a)(3) of the Tariff Act of 1930; and

"(B)(i) a copy of the determination and the facts and conclusions of law upon which such determination was based, (ii) all transcripts or records of conferences or hearings, and (iii) all notices published in the Federal Register.

"(2) The administering authority or the Commission shall identify and transmit under seal to the clerk of the court any document, comment,m or information that is accorded confidential or privileged status by the Government agency whose action is being contested and that is required to be transmitted to the clerk under paragraph (1) of this subsection. Any such document, or information shall be accompanied by a nonconfidential description of the nature of the material being transmitted. The confidential or privileged status of such material shall be preserved in the civil action, but the court may examine the confidential or privileged material in camera and may make such material available under such terms and conditions as the court may order.

"(c) Within fifteen days, or within such other period of time as the Court of International Trade may specify, after service of a summons and complaint in a civil action involving an application for an order directing the administering authority or the International Trade Commission to make confidential information available under section

777(c)(2) of the Tariff Act of 1930, the administering authority or the Commission shall transmit under seal to the clerk of the Court of International Trade, as prescribed by its rules, the confidential information involved, together with pertinent parts of the record. Such information shall be accompanied by a nonconfidential description of the nature of the information being transmitted. The confidential status of such information shall be preserved in the civil action, but the court may examine the confidential information in camera and may make such information available under a protective order consistent with section 777(c)(2) of the Tariff Act of 1930.

'(d)(1) In any other civil action in the Court of International Trade in which judicial review is to proceed upon the basis of the record made before an agency, the agency shall, within forty days or within such other period of time as the court may specify, after the date of service of the summons and complaint upon the agency, transmit to the clerk of the court, as prescribed by its rules—

"(A) a copy of the contested determination and the findings or report upon which such determination was based;

"(B) a copy of any reported hearings or conferences conducted by the agency; and

"(C) any documents, comments, or other papers filed by the public, interested parties, or governments with respect to the agency's action.

"(2) The agency shall identify and transmit under seal to the clerk of the court any document, comment, or other information that was obtained on a confidential basis and that is required to be transmitted to the clerk under paragraph (1) of this subsection. Any such document, comment, or information shall include a nonconfidential description of the nature of the material being transmitted. The confidential or privileged status of such material shall be preserved in the civil action, but the court may examine

such material in camera and may make such material available under such terms and conditions as the court may order.

"(3) The parties may stipulate that fewer documents, comments, or other information than those specified in paragraph (1) of this subsection shall be transmitted to the clerk of the court.

"§ 2636. Time for commencement of action

"(a) A civil action contesting the denial, in whole or in part, of a protest under section 515 of the Tariff Act of 1930 is barred unless commenced in accordance with the rules of the Court of International Trade—

> "(1) within one hundred and eighty days after the date of mailing of notice of denial of a protest under section 515(a) of such Act; or
>
> "(2) within one hundred and eighty days after the date of denial of a protest by operation of law under the provisions of section 5125(b) of such Act.

"(b) A civil action contesting the denial of a petition under section 516 of the Tariff Act of 1930 is barred unless commenced in accordance with the rules of the Court of International Trade within thirty days after the date of mailing of a notice pursuant to section 516(c) of such Act.

"(c) A civil action contesting a reviewable determination listed in section 516A of the Tariff Act of 1930, other than a determination under section 703(b), 703(c), 733(b), or 733(c) of such Act, is barred unless commenced in accordance with the rules of the Court of International Trade within thirty days after the date of the publication of such determination in the Federal Register.

"(d)(1) A civil action contesting a determination by the administering authority under section 703(c) or 733(c) of the Tariff Act of 1930 that a case is extraordinarily complicated is barred unless commenced in accordance with

the rules of the Court of International Trade within ten days after the date of the publication of such determination in the Federal Register.

"(2) A civil action contesting a negative determination by the administering authority under section 703(b) or 733(b) of the Tariff Act of 1930 is barred unless commenced in accordance with the rules of the Court of International Trade within ten days after the date of the publication of such determination in the Federal Register.

"(e) A civil action contesting a final determination of the Secretary of Labor under section 223 of the Trade Act of 1974 or a final determination of the Secretary of Commerce under section 251 or section 271 of such Act is barred unless commenced in accordance with the rules of the Court of International Trade within sixty days after the date of notice of such determination.

"(f) A civil action contesting a final determination made under section 305(b)(1) of the Trade Agreements Act of 1979 is barred unless commenced in accordance with the rules of the Court of International Trade within thirty days after the date of the publication of such determination in the Federal Register.

"(g) A civil action involving an application for the issuance of an order making confidential information available under section 777(c)(2) of the Tariff Act of 1930 is barred unless commenced in accordance with the rules of the Court of International Trade within ten days after the date of the denial of the request for such confidential information.

"(h) A civil action contesting the denial or revocation by the Secretary of the Treasury of a customhouse broker's license under section 641(a) of the Tariff Act of 1930 or the revocation or suspension by such Secretary of a customhouse broker's license under section 641(b) of such Act is barred unless commenced in accordance with the

rules of the Court of International Trade within sixty days after the date of the entry of the decision or order of such Secretary.

"(i) A civil action of which the Court of International Trade has jurisdiction under section 1581 of this title, other than an action specified in subsections (a)—(h) of this section, is barred unless commenced in accordance with the rules of the court within two years after the cause of action first accrues.

"§ 2637. Exhaustion of administrative remedies

"(a) A civil action contesting the denial of a protest under section 515 of the Tariff Act of 1930 may be commenced in the Court of International Trade only if all liquidated duties, charges, or exactions have been paid at the time the action is commenced, except that a surety's obligation to pay such liquidated duties, charges, or exactions is limited to the sum of any bond related to each entry included in the denied protest.

"(b) A civil action contesting the denial of a petition under section 516 of the Tariff Act of 1930 may be commenced in the Court of International Trade only by a person who has first exhausted the procedures set forth in such section.

"(c) A civil action described in section 158(h) of this title may be commenced in the Court of International Trade prior to the exhaustion of administrative remedies if the person commencing the action makes the demonstration required by such section.

"(d) In any civil action not specified in this section, the Court of International Trade shall, where appropriate, require the exhaustion of administrative remedies.

"§ 2638. New grounds in support of a civil action

"In any civil action under section 515 of the Tariff Act of 1930 in which the denial, in whole or in part, of a

protest is a precondition to the commencement of a civil action in the Court of International Trade, the court, by rule, may consider any new ground in support of the civil action if such new ground—

"(1) applies to the same merchandise that was the subject of the protest; and

"(2) is related to the same administrative decision listed in section 514 of the Tariff Act of 1930 that was contested in the protest.

"§ 2639. Burden of proof; evidence of value

"(a)(1) Except as provided in paragraph (2) of this subsection, in any civil action commenced in the Court of International Trade under section 515, 516, or 516A of the Tariff Act of 1930, the decision of the Secretary of the Treasury, the administering authority, or the International Trade Commission is presumed to be correct. The burden of proving otherwise shall rest upon the party challenging such decision.

"(2) The provisions of paragraph (1) of this subsection shall not apply to any civil action commenced in the Court of International Trade under section 1582 of this title.

"(b) In any civil action described in section 1581(h) of this title, the person commencing the action shall have the burden of making the demonstration required by such section by clear and convincing evidence.

"(c) Where the value of merchandise or any of its components is in issue in any civil action in the Court of International Trade—

"(1) reports or depositions of consuls, customs officers, and other officers of the United States, and depositions and affidavits of other persons whose attendance cannot reasonably be had, maybe admitted into evidence when served upon the opposing party as prescribed by the rules of the court; and

"(2) price lists and catalogs may be admitted in evidence when duly authenticated, relevant, and material.

"§ 2640. Scope and standard of review

"(a) The Court of International Trade shall make its determinations upon the basis of the record made before the court in the following categories of civil actions:

"(1) Civil actions contesting the denial of a protest under section 515 of the Tariff Act of 1930.

"(2) Civil actions commenced under section 516 of the Tariff Act of 1930.

"(3) Civil actions commenced to review a final determination made under section 305(b)(1) of the Trade Agreements Act of 1979.

"(4) Civil actions commenced under section 777(c)(2) of the Tariff Act of 1930.

"(5) Civil actions commenced to review any decision of the Secretary of the Treasury to deny or revoke a customhouse broker's license under section 641(a) of the Tariff Act of 1930.

"(6) Civil actions commenced under section 1582 of this title.

"(b) In any civil action commenced in the Court of International Trade under section 516A of the Tariff Act of 1930, the court shall review the matter as specified in subsection (b) of such section.

'(c) In any civil action commenced in the Court of International Trade to review any final determination of the Secretary of Labor under section 223 of the Trade Act of 1974 or any final determination of the Secretary of Commerce under section 251 or section 271 of such Act, the court shall review the matter as specified in section 284 of such Act.

"(d) In any civil action not specified in this section, the Court of International Trade shall review the matter as provided in section 706 of title 5.

"§ 2641. Witnesses; inspection of documents

"(a) Except as otherwise provided by law, in any civil action in the Court of International Trade, each party and its counsel shall have an opportunity to introduce evidence, to hear and cross-examine the witnesses of the other party, and to inspect all samples and papers admitted or offered as evidence, as prescribed by the rules of the court. Except as provided in section 2639 of this title, subsection (b) of this section, or the rules of the court, the Federal Rules of Evidence shall apply to all civil actions in the Court of International Trade.

"(b) The Court of International Trade may order that trade secrets and commercial or financial information which is privileged and confidential, or any information provided to the United States by any foreign government or foreign person, may be disclosed to a party, its counsel, or any other person under such terms and conditions as the court may order.

"§ 2642. Analysis of imported merchandise

"The Court of International Trade may order an analysis of imported merchandise and reports thereon by laboratories or agencies of the United States.

"§ 2643. Relief

"(a) The Court of International Trade may enter a money judgment—

"(1) for or against the United States in any civil action commenced under section 1581 or 1582 of this title; and

"(2) for or against the United States or any other party in any counterclaim, cross-claim, or third-party action under section 1583 of this title.

"(b) If the Court of International Trade is unable to determine the correct decision on the basis of the evidence presented in any civil action, the court may order a retrial or rehearing for all purposes, or may order such further administrative or adjudicative procedures as the court considers necessary to enable it to reach the correct decision.

"(c)(1) Except as provided in paragraphs (2), (3), and (4) of this subsection, the Court of International Trade may, in addition to the orders specified in subsections (a) and (b) of this section, order any other form of relief that is appropriate in a civil action, including, but not limited to, declaratory judgments, orders of remand, injunctions, and writs of mandamus and prohibition.

"(2) The Court of International Trade may not grant an injunction or issue a writ of mandamus in any civil action commenced to review any final determination of the Secretary of Labor under section 223 of the Trade Act of 1974, or any final determination of the Secretary of Commerce under section 251 or section 271 of such Act.

"(3) In any civil action involving an application for the issuance of an order directing the administering authority or the International Trade Commission to make confidential information available under section 777(c)(2) of the Tariff Act of 1930, the Court of International Trade may issue an order of disclosure only with respect to the information specified in such section.

"(4) In any civil action described in section 1581(h) of this title, the Court of International Trade may only order the appropriate declaratory relief.

"(d) If a surety commences a civil action in the Court of International Trade, such surety shall recover only the amount of the liquidated duties, charges, or exactions paid on the entries included in such action. The excess amount of any recovery shall be paid to the importer of record.

"§ 2644. Interest

"If, in a civil action in the Court of International Trade under section 515 of the Tariff Act of 1930, the plaintiff obtains monetary relief by a judgment or under a stipulation agreement, interest shall be allowed at an annual rate established under section 6621 of the Internal Revenue Code of 1954. Such interest shall be calculated from the date of the filing of the summons in such action to the date of the refund.

"§ 2645. Decisions

"(a) A final decision of the Court of International Trade in a contested civil action or a decision granting or refusing a preliminary injunction shall be supported by—

"(1) a statement of findings of fact and conclusions of law; or

"(2) an opinion stating the reasons and facts upon which the decision is based.

"(b) After the Court of International Trade has rendered a judgment, the court may, upon the motion of a party or upon its own motion, amend its findings or make additional findings and may amend the decision and judgment accordingly. A motion of a party or the court shall be made not later than thirty days after the date of entry of the judgment.

"(c) A decision of the Court of International Trade is final and conclusive, unless a retrial or rehearing is granted pursuant to section 2646 of this title or an appeal is taken to the Court of Customs and Patent Appeals within the time and in the manner provided in section 2601 of this title.

"§ 2646. Retrial or rehearing

"After the Court of International Trade has rendered a judgment or order, the court may, upon the motion of a party or upon its own motion, grant a retrial or re-

hearing, as the case may be. A motion of a party or the court shall be made not later than thirty days after the date of entry of the judgment or order.

"§ 2647. Procedence of cases

"The following civil actions in the Court of International Trade shall be given precedence, in the following order, over other civil actions pending before the court, and shall be assigned for hearing at the earliest practicable date and expedited in every way:

"(1) First, a civil action involving the exclusion of perishable merchandise or the redelivery of such merchandise.

"(2) Second, a civil action for the review of a determination under section 516A(a)(1)(B) (i) or (ii) of the Tariff Act of 1930.

"(3) Third, a civil action commenced under section 515 of the Tariff Act of 1930 involving the exclusion or redelivery of merchandise.

"(4) Fourth, a civil action commenced under section 516 or 516A of the Tariff Act of 1930, other than a civil action described in paragraph (2) of this section."

JURY TRIALS

SEC. 302. (a) Chapter 121 of title 28, United States Code, is amended by adding at the end thereof the following new section:

"§ 1876. Trial by jury in the Court of International Trade

"(a) In any civil action in the Court of International Trade which is to be tried before a jury, the jury shall be selected in accordance with the provisions of this chapter and under the procedures set forth in the jury selection plan of the district court for the judicial district in which the case is to be tried.

"(b) Whenever the Court of International Trade conducts a jury trial—

"(1) the clerk of the district court for the judicial district in which the Court of International Trade is sitting, or an authorized deputy clerk, shall act as clerk of the Court of International Trade for the purposes of selecting and summoning the jury;

"(2) the qualifications for jurors shall be the same as those established by section 1865(b) of this title for jurors in the district courts of the United States;

"(3) each party shall be entitled to challenge jurors in accordance with section 1870 of this title; and

"(4) jurors shall be compensated in accordance with section 1871 of this title."

(b) The section analysis for chapter 121 of title 28, United States Code, is amended by adding at the end thereof the following new items:

"1876. Trial by jury in the Court of International Trade.".

(c) Section 1862 of title 28, United States Code, is amended by inserting "or in the Court of International Trade" immediately after "United States".

TITLE IV—COURT OF CUSTOMS AND PATENT APPEALS

JURISDICTION OF THE COURT

SEC. 401. (a)(1) Section 1541(a) of title 28, United States Code, is amended to read as follows:

"(a) The Court of Customs and Patent Appeals shall have exclusive jurisdiction of appeals from all final decisions of the Court of International Trade.".

(2) Section 1541 of title 28, United States Code, is amended by adding at the end thereof the following new subsection:

"(c) The Court of Customs and Patent Appeals shall have exclusive jurisdiction of appeals from interlocutory orders of the Court of International Trade granting, continuing, modifying, refusing, or dissolving injunctions, or refusing to dissolve or modify injunctions.".

(b)(1) Section 1543 of title 28, United States Code,; is amended to read as follows:

"§ 1543. International Trade Commission determination

"The Court of Customs and Patent Appeals shall have jurisdiction to review the final determinations of the United States International Trade Commission made under section 337 of the Tariff Act of 1930 relating to unfair trade practices in import trade.".

(2) The item relating to section 1543 in the section analysis of chapter 93 of title 28, United States Code, is amended to read as follows:
"1543. International Trade Commission determination.".

POWERS OF THE COURT

SEC. 402. (a) Chapter 93 of title 28, United States Code, as amended by section 401 of this Act, is further amended by adding at the end thereof the following new section:

11§ 1546. Powers in law and equity

"The Court of Customs and Patent Appeals shall have all the powers in law and equity of, or as conferred by statute upon, a court of appeals of the United States."

(b) The section analysis of chapter 93 of title 28, United States Code, as amended by section 401 of this Act, is further amended by adding at the end thereof the following new item:
"15436. Powers in law and equity."

COURT OF CUSTOMS AND PATENT APPEALS

SEC. 403. (a) Section 2601(a) of title 28, United States Code, is amended by adding at the end thereof the fol-

lowing new sentence: "If a timely notice of appeal is filed by a party, any other party may file a notice of appeal within fourteen days after the date on which the first notice of appeal was filed.".

(b) The first sentence of section 2601(b) of title 28, United States Code, is amended—

(1) by inserting "or cross appeal" immediately after "appeal" each place it appears; and

(2)by striking out "which shall include a concise statement of the errors complained of".

(c) The third sentence of section 2601(b) of title 28, United States Code, is amended by striking out "and the Secretary of the Treasury or their designees" and inserting in lieu thereof "and any named official".

(d) Section 2601(c) of title 28, United States Code, is amended by inserting immediately after the first sentence the following new sentences: "Findings of fact shall not be set aside unless clearly erroneous and due regard shall be given to the opportunity of the Court of International Trade to judge the credibility of the witnesses. A party may raise on appeal the question of whether the findings of fact are clearly erroneous, whether or not the party raising such question made an objection to such findings in the Court of International Trade or made a motion to amend such findings.".

(e)(1) Section 2602 of title 28, United States Code,; is amended to read as follows:

"§ 2602. Precedence of cases

"The following civil actions in the Court of Customs and Patent Appeals shall be given precedence, in the following order, over other civil actions pending before the court, and shall be assigned for hearing at the earliest practicable date and expedited in every way:

"(1) First, a civil action involving the exclusion of perishable merchandise or the redelivery of such merchandise.

"(2) Second, a civil action for the review of a determination under section 516A(a)(1)(B) (i) or (ii) of the Tariff Act of 1930.

"(3) Third, a civil action commenced under section 515 of the Tariff Act of 1930 involving the exclusion or redelivery of merchandise.

"(4) Fourth, a civil action commenced under section 516 or 516A of the Tariff Act of 1930, other than a civil action described in paragraph (2) of this section.

"(5) Fifth, an appeal from findings of the Secretary of Commerce provided for in headnote 6 to schedule 8, part 4, of the Tariff Schedules of the United States (19 U.S.C. 1202).".

(2) The item relating to section 2602 in the section analysis of chapter 167 of title 28, United States Code, is amended to read as follows:
"2602. Precedence of cases.

RULES OF EVIDENCE

SEC. 404. (a) Chapter 167 of title 28, United States Code, is amended by adding at the end thereof the following new section:

"§ 2603. Rules of evidence

"Except as provided in section 2639 or 2641(b) of this title or in the rules prescribed by the court, the Federal Rules of Evidence shall apply in the Court of Customs and Patent Appeals in any appeal from the Court of International Trade.

(b) The section analysis of chapter 167 of title 28, United States Code, is amended by adding at the end thereof the following new item:
"2603. Rules of evidence."

JUDICIAL CONFERENCE

SEC. 405. (a) Chapter 167 of title 28, United States Code, as amended by section 404 of this Act, is further amended by adding at the end thereof the following new section:

"§ 2604. Judicial conference

"The chief judge of the Court of Customs and Patent Appeals is authorized to summon annually the judge of such court to a judicial conference, at a time and place that such chief judge designates, for the purpose of considering the business of such court and improvements in the administration of justice in such court."

(b) The section analysis of chapter 167 of title 28, United States Code, as amended by section 404 of this Act, is further amended by adding at the end thereof the following new item:

"2604. Judicial conference.".

TITLE V—TECHNICAL AND CONFORMING AMENDMENTS TO TITLE 28

SEC. 501. The following provisions of title 28, United States Code, are amended by striking out "Customs Court" and inserting in lieu thereof "Court of International Trade":

(1) The item relating to chapter 11 in the chapter analysis of part I.

(2) The chapter heading of chapter 11.

(3) Section 253(a).

(4) Section 254.

(5) Section 255(a).

(6) Section 257.

(7) Section 292(e).

(8) Section 293(c).

(9) Section 372 (a) and (b).

(10) Section 451 (including that section as it will become effective on April 1, 1984).

(11) Section 456.

(12) Section 569(a) (including that section as it will become effective on April 1, 1984).

(13) The item relating to chapter 55 in the chapter analysis of part III.

(14) Section 605.

(15) Section 610.

(16) The chapter heading of chapter 55.

(17) Section 871.

(18) Section 872.

(19) Section 873.

(20) The item relating to chapter 95 in the chapter analysis of part IV.

(21) Section 1340.

(22) The item relating to section 1541 in the section analysis of chapter 93.

(23) The section heading for section 1541.

(24) Section 1541(b).

(25) The item relating to chapter 169 in the chapter analysis of part VI.

(26) The item relating to section 2601 in the section analysis of chapter 167.

(27) The section heading for section 2601.

(28) Section 2601 (a), (b), and (c).

SEC. 502. Section 2562 of title 28, United States Code,; is amended by striking out "Judge of the Customs Court" and inserting in lieu thereof "Judges of the Court of International trade".

SEC. 503. Section 518(a) of title 28, United States Code, is amended by inserting "and in the Court of International Trade" immediately after "Claims".

SEC. 504. Section 751 of title 28, United States Code, is amended by adding at the end thereof the following new subsection:

"(f) When the Court of International Trade is sitting in a judicial district, other than the Southern District or Eastern District of New York, the clerk of the district court of such judicial district or an authorized deputy clerk, upon the request of the chief judge of the Court of International Trade and with the approval of such district court, shall act in the district as clerk of the Court of International Trade, as prescribed by the rules and orders of the Court of International Trade for all purposes relating to the civil action then pending before such court.".

SEC. 505. Section 1337 of title 28, United States Code, is amended by adding at the end thereof the following new subsection:

"(c) The district courts shall not have jurisdiction under this section of any matter within the exclusive jurisdiction of the Court of International Trade under chapter 95 of this title.".

SEC. 506. Section 1352 of title 28, United States Code, is amended by inserting immediately before the period at the end thereof the following: ", except matters within the jurisdiction of the Court of International Trade under section 1582 of this title".

SEC. 507. Section 1355 of title 28, United States Code, is amended by inserting immediately before the period at the end thereof the following: ", except matters within the jurisdiction of the Court of International Trade under section 1582 of this title".

SEC. 508. Section 1356 of title 28, United States Code, is amended by inserting immediately before the period at the end thereof the following: ", except matters within the jurisdiction of the Court of International Trade under section 1582 of this title".

SEC. 509. The second paragraph of section 1491 of title 28, United States Code, is amended by striking out "in suits" and inserting in lieu thereof "of any civil action within the exclusive jurisdiction of the Court of International Trade, or of any action".

SEC. 510. Section 1919 of title 28, United States Code, is amended by inserting "or the Court of International Trade" immediately after "court" the first place it appears.

SEC. 511. (a) Chapter 125 of title 28, United States Code, is amended by inserting immediately after section 1963 the following new section:

"§ 1963A. Registration of judgments of the Court of International Trade

"(a) A judgment in any civil action for the recovery of money or property entered by the Court of International Trade which has become final by appeal or expiration of time for appeal may be registered in any judicial district by filing a certified copy of such judgment. A judgment so registered shall have the same effect as a judgment of the district court of the district where registered and may be enforced in like manner.

"(b) A certified copy of the satisfaction of any judgment in whole or in part may be registered in like manner in any district in which the judgment is a lien."

(b) The section analysis of chapter 125 of title 28, United States Code, is amended by inserting immediately after the item relating to section 1963 the following new item: "1963A. Registration of judgments of the Court of International Trade.".

SEC. 5612. The first paragraph of section 24514 of title 28, United States Code, is amended by inserting "or the Court of International Trade" immediately after "court" in the first sentence.

TITLE VI—TECHNICAL AND CONFORMING AMENDMENTS TO OTHER ACTS

SEC. 601 The following provisions of law are amended by striking out "Customs Court" and inserting in lieu thereof "Court of International Trade":

(1) Section 6001 of title 18, United States Code.

(2) Section 305 of the Tariff Act of 1930 (19 U.S.C. 1305).

(3) Section 502(b) of the Tariff Act of 1930 (19 U.S.C. 1502(b)).

(4) Section 503 of the Tariff Act of 1930 (19 U.S.C. 1503).

(5) Section 514 (a) and (b) of the Tariff Act of 1930 (19 U.S.C. 1514 (a) and (b)).

(6) Section 516(d), (e), and (f) of the Tariff Act of 1930 (19 U.S.C. 1516(d)l, (e), and (f).

(7) Section 516A (a)(2), (c), (d), and (e) of the Tariff Act of 1930 (19 U.S.C. 1516a (a)(2), (c), (d), and (e)).

(8) Section 528 of the Tariff Act of 1930 (19 U.S.C. 1528).

(9) Section 308(9) of the Ethics in Government Act (28 U.S.C. app.).

(10) Section 7443(d) of the Internal Revenue Code of 1954.

(11) Section 906 of title 44, United States Code.

SEC. 602. Section 103(h) of the Act of March 27, 1978 (92 Stat. 170; 16 U.S.C. 791(h)) is amended by striking out "section 250 of the Trade Act of 1974 (88 Stat. 2029)" and inserting in lieu thereof "section 284 of the Trade Act of 1974, except that such review shall be in the appropriate court of appeals of the United States,l and the judgment of such court shall be subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of title 28, United States Code.".

SEC. 603. The first section of the Act entitled "An Act to provide the name by which the Board of General Appraisers and members thereof shall be known" approved May 28, 1926 (19 U.S.C. 405a), is repealed.

SEC. 604. Section 337(c) of the Tariff Act of 1930 (19 U.S.C. 1337(c)) is amended—

(1) by inserting "for review in accordance with chapter 7 of title 5, United States Code" immediately before the period at the end of the fourth sentence; and

(2) by striking out the last sentence and inserting in lieu thereof the following new sentence: "Notwithstanding the foregoing provisions of this subsection, Commission determinations under subsections (d), (e), and (f) with respect to its findings on the public health and welfare, competitive conditions in the United States economy, the production of like or directly competitive articles in the United States, and United States consumers, the amount and nature of bond, or the appropriate remedy shall be reviewable in accordance with section 706 of title 5, United States Code.".

SEC. 605. (a) Section 514(a)(4) of the Tariff Act of 1930 (19 U.S.C. 1514(a)(4)) is amended to read as follows:

"(4) the exclusion of merchandise from entry or delivery or a demand for redelivery to customs custody under any provision of the customs laws, except a determination appealable under section 337 of this Act";.

(b) Section 514(a) of the Tariff Act of 1930 (19 U.S.C. 1514(a)) is further amended by striking out "section 2632 of title 28 of the United States Code within the time prescribed by section 2631" and inserting in lieu thereof "chapter 169 of title 28 of the United States Code within the time prescribed by section 2636".

SEC. 606. Section 515(b) of the Tariff Act of 1930 (19 U.S.C. 151(b)) is amended by striking out "section 1582" and inserting in lieu thereof "section 1581".

SEC. 607. (a) Section 516(a) of the Tariff Act of 1930 is amended—

(1) by inserting "(1)" immediately before "The Secretary";

(2) by striking out "(as defined in section 771(9) (C), (D), and (E) of this Act)";

(3) by redesignating paragraphs (1), (2), and (3) as subparagraphs (A), (B), and (C), respectively; and

(4) by inserting at the end thereof the following new paragraph:

"(2) As used in this section, the term 'interested party' means a person who is—

"(A) a manufacturer, producer, or wholesaler in the United States;

"(B) a certified union or recognized union or group of workers which is representative of an in-

dustry engaged in the manufacture, production, or wholesale in the United States; or

"(C) a trade or business association a majority of whose members are manufacturers, producers, or wholesalers in the United States.

of goods of the same class or kind as the designated imported merchandise."

(b) Section 516(d) of the Tariff Act of 1930 (19 U.S.C. 1516(d)) is amended by striking out "section 2632" and inserting in lieu thereof "chapter 169"

SEC. 608. (a) Section 516(a)(1) of the Tariff Act of 19309 (19 U.S.C. 1516a(a)(1)) is amended to read as follows:

"(1) REVIEW OF CERTAIN DETERMINATIONS.—

"(A) THIRTY-DAY REVIEW.—Within 30 days after the date of publication in the Federal Register of notice of—

"(i) a determination by the Secretary or the administering authority, under section 303(a)(3), 702(c), or 732(c) of this Act, not to initiate an investigation.

"(ii) a determination by the administering authority or the Commission, under section 751(b) of this Act, not to review an agreement or a determination based upon changed circumstances, or

"(iii) a negative determination by the Commission, under section 703(a) or 733(a) of this Act, as to whether there is reasonable indication of material injury, threat of material injury, or material retardation.

an interested party who is a party to the proceeding in connection with which the matter arises may com-

mence an action in the United States Court of International Trade by filing concurrently a summons and complaint, each with the content and in the form, manner, and style prescribed by the rules of that court, contesting any factual findings or legal conclusions upon which the determination is based.

"(B) TEN-DAY REVIEW.—Within 10 days after the date of publication in the Federal Register of notice of—

"(i) a determination by the administering authority, under section 703(c) or 733(c) of this Act, that a case is extraordinarily complicated, or

"(ii) a negative determination by the administering authority under section 703(b) or 733(b) of this Act, an interested party who is a party to the proceeding in connection with which the matter arises may commence an action in the United States Court of International Trade by filing concurrently a summons and complaint, each with the content and in the form, manner, and style prescribed by the rules of that court, contesting any factual findings or legal conclusions upon which the determination is based.".

(b) Section 516A(a)(3) of the Tariff Act of 1930 (19 U.S.C. 1516a(a)(3)) is amended by striking out "section 2632" and inserting in lieu thereof "chapter 169".

(c) Section 516A(c)(2) of the Tariff Act of 1930 (19 U.S.C. 1516a(c)(2)) is amended by striking out the second sentence.

(d) The second sentence of section 516A(d) of the Tariff Act of 1930 (19 U.S.C. 1516a(d)) is amended to read as follows: "The party filing the action shall notify all such interested parties of the filing of an action under this section, in the form, manner, style, and within the time prescribed by rules of the court.".

SEC. 609. Section 592(e) of the Tariff Act of 1930 (19 U.S.C. 1592(e)) is amended by striking out "(e) DISTRICT COURT PROCEEDINGS.—" and all that follows through "under this section—" and inserting in lieu thereof the following:

"(e) COURT OF INTERNATIONAL TRADE PROCEEDINGS.—Notwithstanding any other provision of law, is any proceeding commenced by the United States in the Court of International Trade for the recovery of any monetary penalty claimed under this section—".

SEC. 610. Section 604 of the Tariff Act of 1930 (19 U.S.C.l 1604) is amended—

(1) by striking out "every United States district attorney" and inserting in lieu thereof "the Attorney General of the United States";

(2) by inserting "or the Court of International Trade" immediately after "district court"; and

(3) by striking out "such district attorney" and inserting in lieu thereof "the Attorney General".

SEC. 611. (a) The second sentence of the second paragraph of section 641(b) of the Tariff Act of 1930 (19 U.S.C. 1641(b) is amended by striking out "in the circuit court" and all that follows through "District of Columbia" and inserting in lieu thereof "in the Court of International Trade".

(b) Section 641(b) of the Tariff Act of 1930 (19 U.S.C. 1641(b)) is amended by striking out the next to last sentence of the second paragraph.

SEC. 612. Section 250 of the Trade Act of 1974 (19 U.S.C. 2322), and the item relating to such section in the table of contents of such Act, are repealed.

SEC. 613. (a) Title II of the Trade Act of 1974 (19 U.S.C. 2251 et seq.) is amended by redesignating section

284 as section 285 and by inserting immediately after section 283 the following new section:

"SEC. 284. JUDICIAL REVIEW.

"(a) A worker, group of workers, certified or recognized union, or authorized representative of such worker or group aggrieved by a final determination of the Secretary of Labor under section 223 of this title, a firm or its representative or any other interested domestic party aggrieved by a final determination of the Secretary of Commercial under section 271 of this title may, within sixty days after notice of such determination, commence a civil action in the United States Court of International Trade for review of such determination. The clerk of such court shall send a copy of the summons and the complaint in such action to the Secretary of Labor or the Secretary of Commerce, as the case may be. Upon receiving a copy of such summons and complaint, such Secretary shall promptly certify and file in such court the record on which he based such determination.

"(b) The findings of fact by the Secretary of Labor or the Secretary of Commerce, as the case may be, if supported by substantial evidence, shall be conclusive; but the court, for good cause shown, may remand the case to such Secretary to take further evidence, and such Secretary may thereupon make new or modified findings of fact and may modify his previous action, and shall certify to the court the record of the further proceedings. Such new or modified findings of fact shall likewise be conclusive if supported by substantial evidence.

"(c) The Court of International Trade shall have jurisdiction to affirm the action of the Secretary of Labor or the Secretary of Commerce, as the case may be, or to set such action aside, in whole or in part. The judgment of the Court of International Trade shall be subject to review by the United States Court of Customs and Patent Appeals as prescribed by the rules of such court. The judgment of

the Court of Customs and Patent Appeals shall be subject to review by the Supreme Court of the United States upon certiorari as provided in section 1256 of title 28.".

(b) The table of contents of the Trade Act of 1974 (19 U.S.C. 2101 et seq.) is amended by striking out the item relating to section 284 and inserting in lieu thereof the following new items:
"Sec. 284. Judicial review.
"Sec. 285. Effective date."

TITLE VII—EFFECTIVE DATES AND MISCELLANEOUS PROVISIONS

EFFECTIVE DATES

SEC. 701. (a) Except as provided in subsection (b) of this section, the provisions of and amendments made by this Act shall take effect on November 1, 1980.

(b)(1) The following sections of title 28, United States Code, shall apply with respect to civil actions commenced on or after the 90th day after the effective date of this Act:

(A) Sections 1582, 2639(a)(2), and 2640(a)(6), as amended by sections 201 and 301 of this Act.

(B) Sections 1352, 1355, and 1356, as amended by sections 506, 507, and 508 of this Act.

(2) Section 592(e) of the Tariff Act of 1930, as amended by section 609 of this Act, shall apply with respect to civil actions commenced on or after 90th day after the effective date of this Act.

TREATMENT OF REFERENCES

SEC. 702. Any reference in any statute or regulation of the United States to the United States Customs Court, the U.S. Customs Court, or the Customs Court shall be

deemed to be a reference to the United States Court of International Trade.

EFFECT ON CUSTOMS COURT JUDGES

SEC. 703. (a) Except as provided in subsection (b) of this section, the amendments made by title I of this Act shall not affect the status of any individual serving as judge or chief judge of the Customs Court on the date of enactment of this Act.

(b) The requirement that a person may not continue to serve as chief judge of the Court of International Trade after having reached the age of seventy years, as set forth in the amendment made by section 101 of this Act, shall apply to any individual serving as Chief judge on or after the date of enactment of this Act.

EFFECT ON PENDING CASES

SEC. 704. Nothing in this Act shall cause the dismissal of any action commenced prior to the date of enactment of this Act under jurisdictional statutes relating to the Customs Court or the Court of Customs and Patent Appeals as in effect immediately prior to such date of enactment.

TVA LEGAL REPRESENTATION

SEC. 705. Nothing in this Act affects the authority of the Tennessee Valley Authority under the Tennessee Valley Authority Act of 1933 to represent itself by attorneys of its choosing.

Approved October 10, 1980.

CUSTOMS PROCEDURE REFORM AND SIMPLIFICATION ACT OF 1978

P.L. 95-410, see page 92 Stat. 888

House Report (Ways and Means Committee) No. 95-621,

Sept.
23, 1977 [To accompany H.R. 8149]

Senate Report (Finance Committee)l No. 95-778, May 2, 1978
[To accompany H.R. 8149]

House Conference Report No. 95-1517, Aug. 17, 1978
[To accompany H.R. 8149]

Cong. Record Vol. 123 (1977)

Cong. Record Vol. 124 (1978)

DATES OF CONSIDERATION AND PASSAGE

House October 17, 1977; September 19, 1978

Senate June 7, August 25, 1978

The Senate Report (this page) and the House Conference Report (p. 2249) are set out.

SENATE REPORT NO. 95-778

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CUSTOMS REFORM ACT
P.L. 95-410

Liquor and Tobacco

The disparity between the rights of U.S. residents and nonresidents to enter liquor and cigarettes free of duty would be reduced. A nonresident may now bring in duty free substantially more liquor and cigarettes than may a resident. Under the bill, both residents and nonresidents would be able to import 1 liter of alcoholic beverages and 200 cigarettes duty free. This represents a cutback in present levels in all respects save the quantity of liquor which a resident may now import duty free.

Time Limit on Liquidation

The bill, as amended by the committee, would put a 1-year limit on the time in which customs has to liquidate an entry. "Liquidation" means the final ascertainment of the amount of duties due on an entry. Eliminated by this provision would be unanticipated requests by Customs, many years after importation, for additional duties which often result in substantial losses to importers because they are unable to anticipate such duties when pricing their products. Surety companies, which are jointly liable with importers for additional duties, would be better able to control their liabilities. Sureties would also be better protected against losses resulting from the dissolution of their principals in instances where there has been undue delay in liquidating entries. Benefits to Customs would primarily relate to improved management of the liquidation process which could result in some cost savings.

COUNTERFEIT TRADEMARKS

The bill, as amended by the committee, changes the procedures relating to disposal of imported merchandise which violates the law prohibiting unauthorized imports of

merchandise bearing a mark copying or simulating a U.S. registered trademark. The bill would require notification of the trademark owner when such goods are seized by the Customs Service.

Goods seized under this provision would be forfeited to the Government unless the trademark owner consents, in writing to some other disposition of the goods. The Government would have to attempt to donate the forfeited goods to a Federal, State, or local government agency or to a charitable institution. One year after forfeiture, the goods could be sold at a public auction. Destruction of the goods would be permitted if they are unsafe or a hazard to health.

PREFERENTIAL TREATMENT FOR U.S. OFFICIALS

The bill, as amended by the committee, would prohibit duty-free entry for any individual including an officer or employee of the Federal Government or Member of Congress.

* * *

23. Liquidation of entries Within a Specific Time Period (Section 209 of the Bill)

Present law.—"Liquidation" is the final computation by customs of the duties due on an entry. There is no present law requiring liquidation to be completed within a specific time period. Indeed, prior to the Customs Courts and Administrative Act of 1970, it would have been difficult to establish such a time limit because the law permitted an importer to contest in the Customs Court the appraised value of his importation as determined by the Customs Service before liquidation could occur. The 1970 Act merged all decisions of the Customs Service with respect to value, classification, quantity, and amount of duties into a single action, the liquidation. These decisions can now be contested by lodging a protest against the liquidation.

House bill—The House bill would add a new section 504 to the Tariff Act of 1930. Subsection an of the new section would provide that an entry is deemed liquidated if not actually liquidated within 1 year from: (1) the date of entry (2) the date of final withdrawal of all the merchandise covered by a warehouse entry, or (3) the date of withdrawal from warehouse for consumption where duties may be deposited after the filing of an entry or withdrawal from warehouse. The merchandise would be deemed liquidated at the rate of duty, value, quantity, and amount of duties asserted by the importer, his consignee, or agent in the entry document and import documents filed with Customs under section 484 of the Tariff Act at the time of entry. Notice of liquidation by customs would not be required for entries deemed liquidated.

Subsection (b) of new section 504 would permit the Secretary of the Treasury to extend the 1-year period for liquidation in specific situations by giving notice of the extension. Subsection (c) would require notice of any suspension of liquidation to be given to the importer or consignee concerned and to any authorized agent and surety of such importer or consignee.

Subsection (d) would provide that any entries not liquidated at the expiration of 4 years from the dates prescribed in subsection (a) shall be deemed liquidated, except where liquidation continues to be suspended pursuant to statute or court order.

Committee amendment.—The committee adopted the House provision with one amendment. The committee amendment would require Customs to provide notice of liquidation in cases where an entry is deemed liquidated.

Reason for change.—The provisions adopted by the committee would increase certainty in the customs process for importers, surety companies, and other third parties with a potential liability relating to a customs transaction. Under the present law, an importer may learn years after

goods have been imported and sold that additional duties are due, or may have deposited more money for estimated duties than are actually due but be unable to recover the excess for years as he awaits liquidation. Surety companies, which are jointly liable with importers for additional duties, would be better able to control their liabilities. Sureties would also be better protected against losses resulting from the dissolution of their principals in instances where there has been undue delay in liquidating entries.

The change to the House bill made by the committee was prompted by the fact that an importer must file a protest with Customs within 90 working days after the date of liquidation to preserve his right to judicial review of a Customs decision with respect to liquidation. If customs failed to issue a notice in deemed liquidated cases, it is possible that my importers will not discover such an entry has been liquidated in time to make a timely protest.

The committee notes that several of the countries participating in the Multilateral Trade Negotiations have requested that the United States establish a time limit within which liquidation must occur. The committee has approved the limitations on liquidation with these requests in mind and expects appropriate compensation in the MTN for this action by the United States.

Revenue effect.—The committee estimates a maximum annual customs revenue loss of $9.5 million.

• • •

Preliminary Determinations (Section 703 of the Tariff Act of 1930)

Present law.—Under section 303(a)(1) of the Tariff Act of 1930, the Secretary must within 6 months after the date on which a petition is filed, or notice of an investigation initiated by the Secretary on his own motion is published, make a preliminary determination whether a

bounty or grant is being paid or bestowed. The 6-month period cannot be extended. The International Trade Commission (ITC) makes no preliminary determination on injury under current law.

Liquidation of entries of merchandise subject to a countervailing duty investigation cannot be suspended under current law until there is a final affirmative determination that a bounty or grant exists under section 303(a)(1). While liquidation is suspended, Treasury usually requires the importer to deposit estimated duties covering the amount of the estimated countervailing duty under section 505 of the Tariff Act of 1930 (19 U.S.C. 1505). Countervailing duties can be imposed retroactively on entries of duty-free articles made on or after the date of an affirmative final determination under section 303(a)(1) and before the date of an affirmative injury determination by the ITC under section 303(b)(1)(A) (see section 303(c) of the Tariff Act).

Of course, in examining the overall injury to a domestic industry, the ITC will consider information which indicates that harm is caused by factors other than the subsidized imports. However, the petitioner will not be required to bear the burden of proving the negative, that is that material injury is not caused by such other factors. Nor will the Commission be required to make any precise, mathematical calculations as to the harm associated with such factors and the harm attributable to subsidized imports.

While injury caused by unfair competition, such as subsidization, does not require as strong a causation link to imports as would be required in determining the existence of injury under fair trade import relief laws, the Commission must satisfy itself that, in light of all the information presented, there is a sufficient causal link between the subsidization and the requisite injury. The determination of the ITC with respect to causation is, under current law, and will be, under section 705, complex and difficult, and is a matter for the judgment of the ITC.

As noted in the explanation of section 703, above, a major objective of this revision of the countervailing duty law is to reduce the length of an investigation. The committee believes that the 12 and 13 month time limits under current law are too long. The committee intends the usual investigation under the new law to be no more than 205 calendar days.

Assessment of Duty (Section 706 of the Tariff Act of 1930)

Present law.—Under current law and practice, the Secretary issues a countervailing duty order upon making his final determination or upon the ITC final affirmative determination, if one is required (*see* 19 C.F.R. 159.4(d)). Countervailing duties are collected under section 303(c) of the Tariff Act on merchandise entered, or withdrawn from warehouse, for consumption on or after the date on which notice of the Secretary's final determination is published in the Federal Register.

Pending liquidation of entries subject to a countervailing duty order. Treasury usually requires the importer to deposit estimated duties, in an amount equal to the amount of the estimated countervailing duty, under section 305 of the Tariff Act (19 U.S.C. 1305).

There are no time limits on the assessment of countervailing duties under current law. However, under section 504 of the Tariff Act (19 U.S.C. 1304) liquidation of entries must generally occur within 1 year after the date of entry, with administrative extensions in certain circumstances for up to 3 years.

The bill.—Section 706 would require the authority to publish a countervailing duty order within 7 calendar days after being notified of an affirmative decision by the ITC under section 705. Duties would have to be assessed no later than 12 months after the end of the annual accounting period of the manufacturer or exporter within which

the merchandise is entered. Estimated duty deposits equal to the amount of the estimated countervailing duty would be required to be deposited at the same time as estimated normal customs duty deposits must be made with respect to the merchandise under section 305(a) of the Tariff Act of 1930 (19 U.S.C. 1305).

If the final determination of the ITC is that there is material injury or threat of material injury which, but for the suspension of liquidation during the investigation, would have been material injury, then section 706 would impose countervailing duties under section 701 (a) on all merchandise liquidation of which has been suspended during the investigation or will be suspended under the order issued under section 703(d)(1). However, if the final ITC determination is that there is (1) only threat of injury which would not have been injury absent the suspension of liquidation, or (2) material retardation of the establishment of an industry, then countervailing duties would be imposed only on merchandise which is entered, or withdrawn from warehouse, for consumption on or after the day on which notice of that ITC determination is published in the Federal Register.

Reason for the provision.—Section 706 would establish time limits on the assessment of countervailing duties, require cash deposits of estimated duties upon entry, and prescribe the entries to which countervailing duties will be applied. In establishing time limits on assessment, section 706 creates an affirmative obligation on the Customs Service. Although the requirement that estimated countervailing duty deposits be made as security pending liquidation should reduce the damage which delayed assessment may cause a domestic industry, the committee intends that countervailing duties be collected expeditiously. This will reduce the uncertainty which prevails during suspension of liquidation for both the importer and the domestic industry.

Articles 5 (6) and (7) of the Agreement prohibit collection of countervailing duties on merchandise entered during an investigation unless the final determination is that there is material injury or threat of material injury which, but of provisional measures, *e.g.*, suspension of liquidation, during the investigation, would have been material injury. Section 706(b) implements this provision for the United States.

Treatment of difference Between Deposit of Estimated Countervailing Duty Order (Section 706 of the Tariff Act of 1930)

Present law.—Under current practice, if the security posted to cover the estimated liability for countervailing duties is different from the actual duty imposed, the difference is refunded or collected, as the case may be, without interest.

The bill.—Under section 707 of the Tariff Act of 1930, as added by the bill, the difference between the security posted under 703(d)(2) on an entry during an investigation and the countervailing duty imposed under section 701(a) would be (1) disregarded, if the security is less, or (2) refunded, if the security is more. No interest would accrue in either case.

After a countervailing duty order is issued under section 706, the difference between estimated duty deposits required under section 706 (a)(3) and countervailing duties imposed under section 701 (a) would be collected or refunded, as the case may be. In either case, interest would be payable as required under section 778 of the Tariff Act, as added by the bill.

* * *

Preliminary Determinations (Section 733 of the tariff Act of 1930)

Present law.—Under section 201(c)(2) of the Antidumping Act (19 U.S.C. 160), if the Secretary concludes, at the

time he makes his 30 day determination under section 201(c)(1), that there is substantial doubt whether an industry is being or is likely to be injured, or is prevented from being established, by reason of the importation of merchandise which is being, or is likely to be sold at less than its fair value, then the ITC must determine within 30 days whether there is no reasonable indication that the industry is being injured or is likely to be injured, or is prevented from being established. If the ITC's determination is affirmative, then the Treasury investigation is terminated.

Under section 201(b)(1) of the Antidumping Act, the Secretary must, within 6 months after the date on which notice of initiation of an investigation is published, make a preliminary determination whether there is reason to believe or suspect that the purchase price of a class or kind of imported merchandise is less, or that the exporter's sales price of that merchandise is less, or likely to be less, than the foreign marker value, or, in the absence of foreign market value, the constructed value, of that merchandise. The 6-month period can be extended up to 9 months if the Secretary determines that he cannot reasonably make the preliminary determination within 6 months.

* * *

Reason for the provision.—Section 735 would establish the time limits and the standards for final determinations, including final critical circumstances determinations, by the authority and the ITC during an antidumping duty investigation. It would also prescribe the consequences of final determinations.

The major differences between current law and section 735 are (1) the requirement that the authority and ITC carry on simultaneous investigations, (2) the time periods for those investigations, and (3) the additional findings relating to critical circumstances and threat of injury. After

an affirmative preliminary determination in an antidumping duty investigation. Article 5(b) of the Agreement requires simultaneous consideration of whether sales at less than fair value and injury exist. Section 735 would implement this requirement for the United States.

The term "fair value", which appears in the current law, is continued under the new antidumping law as a standard for determinations during the investigation. "Fair value" is not defined in current law or in the bill. The committee intends the concept to be applied essentially as an estimate of what foreign market value will be so as to provide the administering authority with greater flexibility during its investigation. The explanation of the term "industry" appears in the explanation of section 771 of the Tariff Act. The explanations of the factors to be considered in determining whether injury exists and the amount of injury necessary for that injury to be material are also in the explanation of section 771 as it relates to the term "material injury."

Section 735(b) contains the same causation term as is in current law, *i.e.*, an industry must be materially injured "by reason of" less-than-fair-value imports. The current practice by the ITC with respect to causation will continue under section 735.

In determining whether injury is "by reason of" less-than-fair-value imports, the ITC now looks at the effects of such imports on the domestic industry. The ITC investigates the conditions of trade and competition and the general condition and structure of the relevant industry. It also considers, among other factors, the quantity, nature, and rate of importation of the imports subject to the investigation, and how the effects of the margin of dumping relate to the injury, if any, to the domestic industry. Current ITC practice with respect to which imports will be considered in determining the impact on the U.S. industry is continued under the bill.

Current law does not, nor will section 735, contemplate that the effects from less-than-fair-value the imports be weighed against the effects associated with other factors (*e.g.*, the volume and prices of imports sold at fair value, construction in demand or changes in patterns of consumption, trade, restrictive practices of and competition between the foreign and domestic producers, developments in technology, and the export performance and productivity of the domestic industry) which may be contributing to overall injury to an industry. Nor is the issue whether less-than-fair-value imports are the principal, a substantial, or a significant cause of material injury. Any such requirement has the undesirable result of making relief more difficult to obtain for industries facing difficulties from a variety of sources; industries that are often the most vulnerable to less-than-fair-value imports.

Of course in examining the overall injury to a domestic industry, the ITC will consider information which indicates that harm is caused by factors other than the less-than-fair-value imports. However, the petitioner will not be required to bear the burden of proving the negative. That is, that material injury is not caused by such other factors. Nor will the Commission be required to make any precise, mathematical calculations as to the harm associated with such factors and the harm attributable to less-than-fair-value imports.

While injury caused by unfair competition, such as less-than-fair-value imports does not require as strong a causation link to imports as would be required in determining the existence of injury under fair trade import relief laws, the commission must satisfy itself that, in light of all the information presented, there is a sufficient causal link between the less-than-fair-value imports and the requisite injury. The determination of the ITC with respect to causation is, under current law, and will be, under section 735, complex and difficult, and is a matter for the judgment of the ITC.

As noted in the explanation of section 733 above, a major objective of this revision of the antidumping duty law is to reduce the length of an investigation. The committee believes that the 13-or 16-month time limits under current law are too long. The committee intends the usual investigation under the new law to be no more than 280 calendar days.

Assessment of duty (Section 736 of the Tariff Act of 1930)

Present law.—Under section 201(a) of the Antidumping Act (19 U.S.C. 160), the Secretary issues a dumping finding upon an affirmative final finding by the ITC, Special dumping duties are imposed under section 202 of the antidumping Act on merchandise which has not been appraised before notice of the finding is published. Pending liquidation of entries subject to a dumping finding. Treasury usually requires the importer to post a security covering the amount of the estimated special dumping duty under section 623 of the Tariff Act of 1930 (19 U.S.C. 1623). The security required is usually a general or term bond.

There are no time limits on assessments of special dumping duties under current law. However, under section 304 of the Tariff Act (19 U.S.C. 1304), liquidation of entries must generally occur within 1 year after the date of entry, with administrative extensions in certain circumstances for up to 3 years.

The bill.—Section 736 would require the authority to publish an antidumping duty order within 7 calendar days after being notified of an affirmative decision by the ITC under section 735. Duties would have to be assessed within 6 months after the date on which the authority receives satisfactory information upon which the assessment may be based, but in no event later than (1) 12 months after the end of the annual accounting period of the manufacturer or exporter within which the merchandise is entered.

or (2) in the case of merchandise not sold prior to its importation into the United States, 12 months after the end of the annual accounting period of the manufacturer or exporter within which it is sold in the United States to a person who is not the exporter of that merchandise.

Generally, estimated duty deposits equal to the amount of the estimated antidumping duty would be required to be deposited at the same time as estimated normal customs duty deposits must be made with respect to the merchandise under section 305(a) of the Tariff Act of 1930 (19 U.S.C. 1305). However, the administering authority could permit the importer to post a bond or other security in lieu of estimated antidumping duty deposits for not more than 90 calendar days after the date on which the antidumping duty order is published under certain conditions. The manufacturer, producer, or exporter of the merchandise would be required to supply the authority sufficient information relating to entries of the merchandise made after the date of the preliminary determination by the authority and before the date of the final determination by the ITC to enable the authority to determine the amount of antidumping duties on that merchandise under section 751(a) of the Tariff Act. If the authority permits the posting of bonds or other security in lieu of estimated duty deposits and makes a determination under section 751, then that determination would be the basis for the assessment of antidumping duties imposed on entries made before the date of the affirmative determination of the ITC. That determination would also be the basis for the deposit of estimated antidumping duties on entries of merchandise by the manufacturer, producer, or exporter who supplies the information, made on or after the earlier of the date on which the determination is made under section 731(a) or the 90th day after the date on which the antidumping duty order is published.

If the final determination of the ITC is that there is material injury or threat of material injury which, but for

the suspension of liquidation during the investigation, would have been material injury, then section 736 would impose antidumping duties under section 731(a) on all merchandise liquidation of which has been suspended during the investigation or will be suspended under the order issued under section 733(d)(1). However, if the final ITC determination is that there is (1) only threat of injury which would not have been injury without the suspension of liquidation, or (2) material retardation of the establishment of an industry, then antidumping duties would be composed only on merchandise which is entered, or withdrawn from warehouse, for consumption on or after the day on which notice of the ITC determination is published in the Federal Register.

Reason for the provision.—Section 736 would establish time limits on the assessment of antidumping duties, require cash deposits of estimated duties upon entry, and prescribe the entries to which antidumping duties may be applied. In establishing time limits on assessment, section 736 creates an affirmative obligation on the Customs Service. Although the requirement that estimated antidumping duty deposits be made as security pending liquidation should reduce the damage which delayed assessment may cause a domestic industry, the committee intends that antidumping duties be collected expeditiously. This will reduce the uncertainty which prevails during suspension of liquidation for both the importer and the domestic industry. In light of the dismal performance of the Department of the Treasury in assessing special dumping duties in the recent past, the committee considers this time limit on assessment to be an extremely important addition to the law.

Article 11 of the Agreement prohibits collection of antidumping duties on merchandise entered during the investigation unless the final determination is that there is a material injury or threat of material injury which, but for provisional measures: *e.g.*, suspension of liquidation

during the investigation, would have been material injury. Section 736(b) implements this provision for the United States.

Treatment of Difference Between Deposit of Estimated Antidumping Duty and Final Assessed Duty Under Antidumping Duty Order (Section 737 of the Tariff Act of 1930)

Present law.—Under current practice, if the security posted to cover the estimated liability for special dumping duties is different from the actual duty imposed, the difference is refunded or collected, as the case may be, without interest.

The bill.—Under section 737 of the Tariff Act of 1930, as added by section 101 of the bill, the difference between the security posted under section 733(d)(2) on an entry during an investigation and the antidumping duty imposed under section 731(a) would be (1) disregarded, if the security is less, or (2) refunded, if the security is more. No interest would accrue in either case.

After an antidumping duty order is issued under section 736, the difference between estimated duty deposits required under section 736(a)(3) and antidumping duties imposed under section 731(a) would be collected or refunded, as the case may be. In either case, interest would be parable as would be required under section 778 of the Tariff Act, as added by section 101 of the bill.

Reason for the provision.—Article 11(1) of the Agreement prohibits collection of the difference between any security posted during the investigation and the final antidumping duty if the latter exceeds the former. Section 737(a) implements this provision for the United States.

Conditional Payment of Antidumping Duty (Section 738 of the Tariff Act of 1930)

Present law.—Under section 208 of the antidumping Act (19 U.S.C. 167), if the person by whom or for whose ac-

count merchandise subject to a dumping finding is imported has not made an oath before the appropriate customs officer (1) that he is not an exporter, or (2) as to the exporter's sales price of that merchandise, then the customs officer may not deliver that merchandise to that person until he has made an oath that he has not sold or agreed to sell the merchandise and he provides a bond in an amount equal to the estimated value of the merchandise. The bond must contain the following conditions. The importer must report to the customs officer the exporter's sales price of the merchandise within 30 days after the merchandise has been sold or agreed to be sold in the United States. The importer must pay upon demand the amount of the special dumping duty, if any imposed under the Antidumping Act on the merchandise. The importer must furnish to the customs officer such information as may be in his possession and as may be necessary for the ascertainment of the special dumping duty. Finally, the importer will keep such records as to the sale of such merchandise as are required by regulation.

The bill.—Section 738 of the Tariff Act of 1930, as added by section 101 of the bill, would prohibit delivery of merchandise of the class or kind subject to an antidumping duty order to the person by whom or for whose account it was imported unless that person deposits an estimated antidumping duty in an amount determined by the administering authority and complies with the following requirements:

> (1) The person must furnish such information as the authority considers necessary for determining the United States price of the merchandise and such other information as the authority deems necessary for determining the antidumping duty on that merchandise.
>
> (2) The person must maintain and furnish to the customs officer such records concerning the sale of the merchandise as the authority requires.

(3) The person must state under oath before the customs officer that he is not an exporter, or, if he is an exporter, declare under oath at the time of entry the exporter's sales price of the merchandise to the customs officer it is then known. If the exporter's sales price is not then known, the importer must declare the exporter's sales price within 30 days after the merchandise has been sold, or has been made subject of an agreement to be sold, in the United States.

(4) The person must pay, or agree to pay on demand, the customs officer the amount of the antidumping duty imposed on that merchandise.

Reason for change.—Section 738 re-enacts the requirements of section 208 of the antidumping Act. Section 738 requires the deposit of an estimated antidumping duty before merchandise may be delivered. The requirement under section 208 of the Antidumping Act that the importer provide a bond in an amount equal to the estimated value of the merchandise will be eliminated.

Duties of Customs Officers (Section 739 of the Tariff Act of 1930)

Present law.—Under section 209 of the antidumping Act, 1921 (19 U.S.C. 168), customs officers are required to use all reasonable ways and means to ascertain, estimate, and appraise the foreign market value or the constructed value, as the case may be, the purchase price, the exporter's sales price, and any other facts which the Secretary of the Treasury may deem necessary for purposes of the Antidumping Act.

The bill.—Section 739 of the Tariff Act of 1930, as added by section 101 of the bill, would require customs officers, by all reasonable ways and means and consistent with the provision of title VII of the Tariff Act of 1930, to ascertain and determine, or estimate, the foreign market value, the

United States price, and any other information necessary for the purposes of administering title VII.

Reason for the provision.—Section 739 reenacts the requirements of section 209 of the antidumping Act, 1921.

Antidumping Duty Treated as Regular Duty for Drawback Purposes (Section 740 of the Tariff Act of 1930)

Present law.—Section 211 of the Antidumping Act, 1921 (19 U.S.C. 170), treats special dumping duties as regular customs duties within the meaning of all laws relating to the drawback of customs duties.

The bill.—Section 740 of the Tariff Act of 1930, as added by section 101 of the bill, would treat antidumping duties in all respects as normal customs duties for the purposes of any law relating to the drawback of customs duties.

Reason for the provision.—Section 740 of this bill reenacts the requirements of section 211 of the antidumping Act.

SUBTITLE C OF TITLE VII OF THE TARIFF ACT OF 1930—REVIEW OF DETERMINATIONS

Administrative Review of Determinations (Section 751 of the Tariff Act of 1930)

Present law.—Under Section 303(a)(5) of the Tariff Act of 1930, (19 U.S.C. 1303), the Secretary of the Treasury may revise the amount of a countervailing duty from time-to-time, as he "deems necessary". Under current practice, the need for a countervailing duty order may be reviewed by the Secretary on his own motion or at the request of an interested party if there are changed circumstances. Under current ITC regulations, the Commission will review an injury finding in a countervailing duty case on its own motion, at the request of an interested party, or upon advice from the Treasury that there are "changed circumstances." Absent "good cause", the ITC will not review

an injury determination within 2 years of a final determination that a bounty or grant exists (19 C.F.R. 207.9).

Under section 202 of the Antidumping Act, 1921 (19 U.S.C. 161), the Secretary of the Treasury determines the amount of an antidumping duty on an entry-by-entry basis. Appropriate adjustments to foreign market value for differences in circumstances of sale and adjustments to other price calculations are made in calculating foreign market value, as they are made in calculating fair value during the original investigation. Under current practice, the need for an antidumping duty finding may be reviewed by the Secretary on his own motion or at the request of an interested party if there are changed circumstances. Under current regulations, the ITC will review an injury finding in an antidumping case on its own motion, at the request of an interested party, or upon advice from Treasury that there are "changed circumstances." absent "good cause", the Commission will not review an injury determination within 2 years of a final determination that injury exists (19 C.F.R.207.3).

The bill.—Section 751 of the bill would require the authority, at least once during each 12 month period beginning on the anniversary of the date of publication of the countervailing duty order or antidumping duty order to review—

(1) the amount of any net subsidy,

(2) the amount of any antidumping duty, and

(3) the current status of, and compliance with, any agreement by reason of which an investigation was suspended.

The Secretary would be required to publish a summary of the results of his review, together with the notice of any duty to be assessed, estimated duty to be deposited, or investigated to be resumed.

In the case of a review of an antidumping duty order, the results of the review would include a determination of the foreign market value and the U.S. price of each entry of merchandise subject to that order and included within the review, and the amount, if any, by which the foreign market value of each such entry exceeds the U.S. price of the entry. That determination would be the basis for the assessment of antidumping duties on entries of the merchandise included within the review and for deposits of estimated duty on entries not covered by the review.

In addition to the required review of the amount of duty, if any, to be assessed pursuant to an antidumping duty or countervailing duty order, or a determination to suspend an investigation upon acceptance of an agreement, section 751 would permit the administering authority or the ITC to review, upon request, an agreement which served as the basis for the suspension of an antidumping duty or countervailing duty investigation or an affirmative determination that such an agreement will completely eliminate the injurious effect of subsidized or dumped imports. In addition the authority could review, upon request, a determination that a subsidy exists or that less-than-fair value sales exists. The ITC could review, upon request, a determination that a domestic industry is being injured by reason of imports of subsidized merchandise or imports of merchandise sold at less than fair value.

The authority and the Commission would initiate reviews under this provision only if they are satisfied that "changed circumstances" sufficient to warrant the review exist. Absent a showing of "good cause", the ITC would not review a final affirmative injury determination under the countervailing duty or antidumping duty law and the administering authority would not review (1) a determination to suspend an investigation upon acceptance of an agreement under either law, or (2) a final affirmative determination that a subsidy exists or that sales at less-than-fair exist,

less than 24 months after the dare of publication of notice of that determination.

If the administering authority determines, during a review under this section, that a subsidy or sales at less-than-fair value no longer exists, the administering authority could, after that review, revoke, in whole or in part, a countervailing duty order or an antidumping order. The authority could also terminate a suspended investigation after a review under this section.

In the case of any review under this section, the administering authority and the ITC would, upon the request of any interested party, hold a hearing to provide an opportunity for the presentation of views with respect to the issue under review.

Reason for the provision.—This provision expedites the administration of the assessment phase of antidumping and countervailing

Senate Report (Judiciary Committee) No. 69-466, Dec. 7, 1979 [To accompany S. 1654]

House Report (Judiciary Committee) No. 96-1235, Aug. 20, 1980 [To accompany H.R. 75401]

Cong. Record vol. 125 (1979)

Cong. Record Vol. 126 (1980)

DATES OF CONSIDERATION AND PASSAGE

Senate December 18, 1979; September 24, 1980

House September 22, 1980
The Senate bill was passed in lieu of the House bill after amending
its language to contain the text of the House bill.

The House Report is set out.
HOUSE REPORT NO. 96-1235

The Committee on the Judiciary, to whom was referred the bill (H.R. 7540) to improve the Federal judicial machinery by clarifying and revising certain provisions of title 28. United States code, relating to the judiciary and judicial review of international trade matters, and for other purposes, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.

* * * * * * * * * *

I. PURPOSE

H.R. 7540, as amended, provides for significant and much-needed reform and clarification in the laws governing the United States Customs Court. Over the years, complex questions have arisen concerning the jurisdiction of the Customs Court, its scope of review, and the type of relief the court may award. Periodically, Congress has addressed these issues and has altered the court's status, jurisdiction

and powers to solve a specific problem or to meet a specific need at a particular time. The result is a patchwork of laws that does not always serve the public interest.

The Customs Court had its genesis in 1890 as the Board of General Appraisers, an administrative unit within the Department of the Treasury, which was responsible for the review of decisions by Customs officials as to the rate and amount of duty imposed on imported merchandise, as well as the value of such merchandise. In 1926, as the types of decisions pertaining to import transactions expanded.

It is the intent of the Committee that importers and their sureties not utilize proposed section 1581 (a) to circumvent the exclusive method of judicial review of an antidumping and countervailing duty determination listed in section 516A of the Tariff Act of 1930 (19 U.S.C. § 1516a), as provided in that section. Section 516A of the Tariff Act of 1930 was added to that Act by the Trade Agreements Act of 1979. The 1979 Act revised the antidumping and countervailing statutes so as to provide *inter alia*, that each year the administering authority must publish a statement of the proposed antidumping or countervailing duty to be assessed upon all merchandise covered by an antidumping or countervailing duty order and which entered the United States during the preceding year. Section 516A of the Tariff Act of 1930 provides that an importer must challenge the assessment or the amount of the antidumping or countervailing duty to be imposed at the time of the annual publication. An importer may not await the actual assessment of the duty, file a protest, and upon denial of the protest file a civil action in the Court of International Trade under proposed section 1581(a). Rather, the committee intends that such actions be commenced pursuant to the statutes governing the commencement of a civil action to review the determinations listed in section 516A of the Tariff Act of 1930.

Subsection (b) of proposed section 1581 is a restatement of existing law, as set forth in 28 U.S.C. § 1582(b). This subsection grants the Court of International Trade exclusive jurisdiction over any civil action commenced by an American manufacturer under section 516 of the Tariff Act of 1930 (19 U.S.C. § 1516) seeking review of administrative determinations regarding imported merchandise. The current prerequisites for the commencement of a civil action are preserved by this legislation, as is the right to a trial *de nevo.*[44]

Subsection (c) of proposed section 1581 is a restatement of the law as it currently exists in 28 U.S.C. § 1582(b). This subsection grants the Court of International Trade exclusive jurisdiction over civil actions commenced to review those antidumping and countervailing duty determinations listed in section 516A of the Tariff Act of 1930. The court's jurisdiction over such actions was added by Title X of the Trade Agreements Act of 1979. As with the case of 515 and 516 civil actions, this legislation preserves most of the current statutory prerequisites governing section 316A civil actions.[44]

Subsection (d) of proposed section 1581 is a new jurisdictional grant of authority of the Court of International Trade. The first portion of subsection (d) transfers exclusive jurisdiction to review a final determination of the Secretary of Labor refusing to certify workers as eligible for adjustment assistance under the Trade Act of 1974 from the United states courts of appeals to the Court of International Trade.[47]

Subsection (d) also expands the court's jurisdiction in two significant ways. First, this subsection provides the Court of International Trade with exclusive jurisdiction to judicially review a final determination by the Secretary of commerce refusing to certify firms or communities as eligible for adjustment assistance under the Trade

TRADE AGREEMENTS ACT OF 1979

REPORT

OF THE

COMMITTEE ON WAYS AND MEANS
HOUSE OF REPRESENTATIVES

TO ACCOMPANY

H.R. 4537

(including cost estimate of the Congressional Budge Office)

JULY 3, 1979.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

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* * *

Recognizing the unique position of the agricultural sector, the bill also contains special provisions relating to the determination of whether material injury exists in cases involving agricultural products:

(1) In either a countervailing or antidumping duty case, the ITC shall examine whether there is any increased burden on government income or price support programs, or threat thereof, and

(2) the ITC shall not determine no injury or threat thereof "merely because the prevailing market price is at or above the minimum support price."

Because of the unique nature of agriculture and the system of government loan, purchase, and deficiency payment programs, considerable flexibility must be provided in determining whether material injury or threat thereof is occurring. For example, beef production and livestock industry employment will be increasing when the industry is actually in distress, that is, the herds are being liquidated because of low prices.

Government income or price support programs are aimed at guaranteeing that farmers receive a fair, not a high, market price. If the market price. If the market price falls below this level, and the farmers take advantage of the program, the government must intervene in the market. Since the intervention of the support program in the market, if due to dumped of subsidized imports, is one of the factors the ITC shall consider, the necessity for such government intervention could be sufficient for a showing of material injury.

Because of the enormous burdens which can be placed on the taxpayer and Treasury when a USDA income or price support program is being burdened, the committee expects that determinations will be made in less than the time permitted by law, as, for example in the case of

subsidized sugar imports from the European Communities in 1978. In addition, due to the nature of government agricultural loan support programs, subsidized or dumped imports can cause or threaten to cause domestic crops to "go under loan". Therefore, consideration must be given in the determination to the threat of burdening these government programs.

With few exceptions, aside from the change in substantive law discussed above, the primary focus of Title I of the bill has been to expedite countervailing and antidumping duty proceedings. This is reflected in the shorter periods provided for preliminary and final determinations by the Authority and the ITC, the establishment of statutory, expanded authority to suspend investigations when early action by the foreign government or exporter will eliminate the unfair trade practice or, in extraordinary circumstances, its injurious effect, and the establishment of a time limit on assessment.

The Committee feels very strongly that both the countervailing and antidumping duty laws have been inadequately enforced in the past, including the lack of resources devoted to this important area of law. The provisions of this bill are intended to remedy this situation.

* * *

If critical circumstances have been alleged during the investigation, the final determinations of both the Authority and the ITC must contain findings as to whether the elements of critical circumstances have in fact been shown. If the findings are affirmative, the antidumping order will apply to entries subject to the retroactive suspension of liquidation.

Notice of all determinations made by the Authority and the ITC shall be published in the Federal Register. Such notice need not contain the findings of fact or conclusions of law on which the determination is based. However, such

information must be publicly available, and the notice will indicate where it can be obtained.

Assessment of duty

The committee is very dissatisfied with the past record of the Secretaries of the Treasury in assessing duties on entries subject to a dumping finding. Unless dumping duties are assessed in a timely fashion, the remedial effect of the law is negated. In this regard, the Committee finds the 3- to 3 1/2-year average delay between entry of merchandise subject to a finding and assessment of dumping duties to be unacceptable. The bill therefore makes two major changes to present law to ensure expeditious administration of an antidumping order. Section 736(a) establishes maximum time limits on assessment whereby assessment must occur within 6 months after the date on which the Authority receives satisfactory information upon which to base assessment, but in no event later than 1 year after the end of the annual accounting period of the manufacturer or exporter during which the merchandise is entered (In the case of a related party transaction, that is, where the U.S. price is not determined until the goods are sold after their entry into the United states, the maximum period for assessment will be 12 months after the end of the accounting period within which the merchandise is sold to an unrelated purchaser in the United States.)

The second major change is the requirement that merchandise subject to an antidumping order may be entered only upon the deposit of estimated antidumping duties. Under present practice such merchandise may enter under bond. The Committee feels strongly that this practice does not sufficiently deter dumping. Rather, it provides an incentive to exporters and importers to delay in submitting the information necessary to form the basis of an assessment. The Committee believes that the requirement of cash deposits will ensure that complete information will be submitted to the Authority in a timely manner. To

further expedite assessment, the bill authorizes the Authority to require that information be submitted in a particular form and manner if reasonably available. For example, the Authority may require the exporter to furnish information on computer tape if the exporter maintains records in that form, but it may not require the exporter to purchase a computer or computerize information. The Authority shall always have the right to require that information be submitted in English.

* * *

Subtitle C—Administrative Review of Determinations

Under current law, the Secretary of the Treasury may revise the amount of a countervailing duty from time-to-time, as he "deems necessary" (19 U.S.C. 1303(a)(5)). Under current practice, the need for a countervailing duty order may be reviewed by the Secretary on his own motion or at the request of an interested party if there are "changed circumstances." Under current ITC regulations, the ITC will review an injury finding in a countervailing duty case on its own motion, at the request of an interested party, or upon advice from the Treasury that there are "changed circumstances." absent "good cause", the ITC will not review an injury determination within 2 years of a final determination that a bounty or grant exists (19 C.F.R. 207.9).

Under current law, the Secretary of the Treasury determines the amount of an antidumping duty on an entry-by-entry basis. Adjustments to foreign market value for differences in circumstances of sales and adjustments to other price calculations are made from time-to-time, as necessary (19 U.S.C. 161). Under current practice, the need for an antidumping duty finding may be reviewed by the Secretary on his own motion or at the request of an interested party if there are "changed circumstances." Under current regulations, the ITC will review an injury finding in an antidumping case on its own motion, at the

request of an interested party, or upon advice from Treasury that there are "changed circumstances." absent "good cause", the ITC will not review an injury determination within 2 years of a final determination that injury exists (19 C.F.R. 207.5).

Section 751 of the bill requires the Authority, at least once during each 12-month period beginning on the anniversary of the date of publication of the countervailing duty order or antidumping duty order, to review—

(1) the amount of any net subsidy.

(2) the amount of any antidumping duty, and

(3) the current status of, and compliance with, any agreement by reason of which an investigation was suspended,

and to publish a summary of the results of such review together with the notice of any duty to be assessed, estimated duty to be deposited, or investigation to be resumed, providing protection of confidential information. In the case of a review of an antidumping duty order, the results of the review will include a determination of the foreign market value and the United States price of each entry of merchandise subject to that order and included within the review, and the amount, if any, by which the foreign market value of each such entry exceeds the United states price of the entry. That determination will be the basis for the assessment of antidumping duties on entries of the merchandise included within the review and for deposits of estimated duty on entries not covered by the review. In addition to the required review of the amount of duty, if any, to be assessed pursuant to an antidumping duty or, countervailing duty order, or a determination to suspend an investigation upon acceptance of an agreement, section 731 permits the Authority or the ITC to review, upon request, an agreement which served as the basis for the suspension of an antidumping duty or countervailing duty investigation or an affirmative determination that (1)

such an agreement will completely eliminate the injurious effect of subsidized or dumped imports, (2) a subsidy exists or that less-than-fair-market-value sales exists, or (3) a domestic industry is being injured by reason of imports of subsidized merchandise or imports of merchandise sold at less-than-fair value. The Authority and the Commission will initiate reviews under this provision only if they are satisfied that "changed circumstances" sufficient to warrant the review exist. Absent a showing of "good cause", the ITC may not review a final affirmative injury determination under the countervailing duty or antidumping duty law and the administering authority may not review a determination to suspend an investigation upon acceptance of an agreement under either law or a final affirmative determination that a subsidy exists or that sales at less-than-fair value exist less than 24 months after the date of publication of notice of that determination or suspension.

If the Authority determines, during a review under this section, that a subsidy or sales at less-than-fair value no longer exists, the Authority may, after a review under this section, revoke, in whole or in part, a countervailing duty order or an antidumping order. The Authority may also terminate a suspended investigation after a review under this section.

In the case of any review under this section, the Authority and the ITC must, upon the request of any interested party, hold a hearing to provide an opportunity for the presentation of views with respect to the issue under review.

This provision expedites the administration of the assessment phase of antidumping and countervailing duty investigations while providing a greater role for domestic interested parties and introducing more procedural safeguards.

Subtitle D—General Procisions

*Definition of "Administering Authority".*The term "Administering Authority' would be the Secretary of the Treasury under current practice, but the statutory definition anticipates possible legislative changes which might provide for a different agency head to assume responsibility with regard to the matters under this title.

Definition of "Country".—For purposes of both subtitle A and subtitle B, the term "country" includes not only the government of a foreign country, but also a political subdivision, dependent territory or possession of a foreign country. Taiwan is intended to fall within the meaning of "country" for purposes of this title. For purposes of subtitle A. dealing with countervailing duties, the term also includes the association of two or more of these entities into a custom union.

Supreme Court, U.S.
FILED
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No. 87-676

In the Supreme Court of the United States

OCTOBER TERM, 1987

MILLER AND COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

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MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

Petitioner challenges the court of appeals' holding that the Court of International Trade had no jurisdiction under 28 U.S.C. 1581(i) because petitioner bypassed the procedures that were available under 28 U.S.C. 1581(c) for raising its claims.

1. Petitioner imports pig iron from Brazil. On April 4, 1980, the International Trade Administration (ITA) of the United States Department of Commerce, having determined that Brazilian pig iron was being subsidized abroad, published an order, pursuant to 19 U.S.C. 1303, that imposed certain countervailing duties on the importation of such iron. On July 7, 1983, pursuant to 19 U.S.C. 1675, the ITA undertook a review of the countervailing duty order to determine the correct amount of the duty for the year 1981. On November 30, 1983, the ITA published its preliminary results and invited comments from interested parties. On March 16, 1984, the ITA published its final determination and directed respondent United States

Customs Service to assess countervailing duties in excess of the estimated duties that had already been paid on 1981 imports of Brazilian pig iron. Pet. App. 2a-3a.

Petitioner, though subject to the duties, did not participate in the ITA's Section 1675 review proceeding. After the ITA published its final results, however, petitioner challenged the ITA's determination in the United States Court of International Trade (CIT). Petitioner claimed that the final determination could not lawfully be enforced because the ITA did not complete its review within the period set forth in 19 U.S.C. 1504 and 1675. Petitioner invoked the CIT's jurisdiction under 28 U.S.C. 1581(i) and, subsequently, under 28 U.S.C. 1581(c) as well. Pet. App. 26a, 28a.

In 1984, the CIT ruled (Pet. App. 14a-22a) that petitioner could not invoke the court's jurisdiction under 28 U.S.C. 1581(c) because it had failed to participate in the administrative proceedings, a prerequisite to Section 1581(c) jurisdiction over a countervailing duty determination.[1] With respect to Section 1581(i), the court recognized that Section 1581(i) "may not be used to circumvent the specific requirements of jurisdiction under § 1581(a)-(h)" (Pet. App. 17a), but it reserved decision on whether petitioner could assert jurisdiction under Section 1581(i) based on the allegation that the ITA's actions were patently ultra vires because out of time (Pet. App. 21a). In 1986, the CIT held (*id.* at 9a-12a) that the ITA's final determination was not ultra vires because the time limits cited by petitioner were suspended until completion of the Section 1675 review. Accordingly, the court rejected petitioner's invocation of Section 1581(i) as a basis of jurisdiction and dismissed the action (Pet. App. 11a).

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[1] Section 1581(c) gives the CIT exclusive jurisdiction over civil actions commenced under 19 U.S.C. 1516a. Under 28 U.S.C. 2631(c), such an action may be commenced only by an "interested party who was a party to the proceeding in connection with which the matter arose."

The United States Court of Appeals for the Federal Circuit affirmed (Pet. App. 1a-8a). The court agreed with the CIT that jurisdiction was unavailable under Section 1581(c) because petitioner failed to participate in the proceedings before the ITA (Pet. App. 7a, 8a). The court also held (*id.* at 8a) that petitioner could not assert jurisdiction under Section 1581(i), although, unlike the CIT, it did not address the merits of petitioner's ultra vires argument.

Section 1581(i)'s residual grant of jurisdiction, the court reasoned, may not be invoked to bypass the specific prerequisites for jurisdiction under another subsection of Section 1581 (Pet. App. 4a-5a). To invoke Section 1581(i), therefore, petitioner had to show that it could not have invoked Section 1581(c) or that the remedy under that subsection would have been "manifestly inadequate" (Pet. App. 5a). The court concluded that petitioner had failed to make either showing. The court ruled that petitioner could have raised its challenge to the timing of the ITA's review of 1981 duties by participating in the ITA proceeding and then challenging the countervailing duty determination under Section 1581(c) (Pet. App. 6a-7a). Moreover, that route to judicial review would have been wholly adequate, as shown by the fact that another importer of Brazilian pig iron used Section 1581(c) to raise precisely the same timing challenge as the one petitioner makes (Pet. App. 7a-8a). Because petitioner had bypassed the proper method of raising its claim, the court of appeals upheld the dismissal of petitioner's suit.

2. Notwithstanding petitioner's elaborate presentation of multiple questions for this Court's review, the only question properly presented is whether the CIT had jurisdiction under Section 1581(i) over petitioner's challenge to the ITA's countervailing duty determination. The court of appeals held that such jurisdiction is lacking. The decision is correct, for the reasons given by the court of appeals. It is not in conflict with any decision of any

other court of appeals, and no such conflict could arise, because of the Federal Circuit's exclusive jurisdiction in this area. Nor is the decision in conflict with any decision of this Court or any other decision of the Federal Circuit. Review by this Court is plainly unwarranted.

Petitioner challenges the countervailing duty determination that the ITA made under 19 U.S.C. 1675. Such a determination is expressly included among the decisions reviewable under Section 516A of the Tariff Act of 1930, 19 U.S.C. 1516a(a)(2)(B)(iii). Under 28 U.S.C. 1581(c), the CIT has "exclusive jurisdiction of any civil action commenced under section 516A of the Tariff Act of 1930." To bring such an action, a plaintiff must have been "a party to the proceeding in connection with which the matter arose"—in this case, the ITA's Section 1675 review proceeding (28 U.S.C. 2631(c)). Petitioner does not dispute that it failed to participate in the ITA proceeding and that jurisdiction under Section 1581(c) is therefore lacking.

Contrary to petitioner's argument (Pet. 6-16), jurisdiction under Section 1581(i) is also lacking. Section 1581(i) provides that, "[i]n addition to the jurisdiction conferred [on the CIT] by subsections (a)-(h)," the CIT "shall have exclusive jurisdiction" over actions arising out of laws that provide for "administration and enforcement with respect to the matters referred to in * * * subsections (a)-(h)" (28 U.S.C. 1581(i)(4)). As the court of appeals correctly ruled (Pet. App. 4a-5a), this grant of residual jurisdiction over certain tariff and trade matters is available only where the more specific jurisdictional grants in 28 U.S.C. 1581 (a)-(h) are not available. Otherwise, the residual jurisdiction could be used to circumvent the specific procedures that Congress established for judicial review under those other subsections. Of particular importance for this case, a successful invocation of Section 1581(i) would permit petitioner to bypass Section 1581(c)'s requirement of administrative participation as a prerequisite to judicial review.

Allowing such an end-run around Section 1581(c)'s exhaustion requirement would undermine the important (and common) congressional policy requiring that challenges to an administrative proceeding be presented initially to the administrative agency, thus affording the agency an opportunity to correct errors without the need for judicial intervention. Moreover, permitting petitioner to bypass Section 1581(c)'s mechanism for review of countervailing duty determinations under 19 U.S.C. 1516a would be directly contrary to Congress's intent in creating the Section 1581(i) residual jurisdiction:

> [I]t is the intent of the Committee that the Court of International Trade not permit subsection (i), and in particular paragraph (4), to be utilized to circumvent the exclusive method of judicial review of those antidumping and countervailing duty determinations listed in section 516A of the Tariff Act of 1930 (19 U.S.C. § 1516a), as provided in that section. Since subsection (i) merely confers jurisdiction on the court and does not create any new causes of action, [the bill] does not change the rights of judicial review which exist under section 516A.
>
> The Committee intends that any determination specified in section 516A of the Tariff Act of 1930 * * * [be] reviewable exclusively as provided in section 516A.

H.R. Rep. 96-1235, 96th Cong., 2d Sess. 48 (1980). Thus, as applied to cases like this one, Section 1581(i) was intended to furnish jurisdiction over an action "relating to an antidumping or countervailing duty proceeding [only] so long as the action does not involve a challenge to a determination" reviewable under Section 1581(c) (H.R. Rep. 96-1235, *supra*, at 48).[2] The court of appeals was

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[2] One illustration of when Section 1581(i) may be available is furnished by *United States Cane Sugar Refiners' Ass'n* v. *Block*, 683 F.2d

therefore entirely correct in holding that, if petitioner could have obtained review under Section 1581(c), it cannot assert jurisdiction under Section 1581(i).

As the court of appeals held (Pet. App. 5a-8a), petitioner could have obtained review under Section 1581(c), simply by participating in the ITA Section 1675 proceeding. Petitioner, which argues chiefly (Pet. 6-16) that it was not *required* to proceed under Section 1581(c), does not seriously contend otherwise. Nothing about the nature of petitioner's claim would have rendered the Section 1581(c) procedures inadequate, as petitioner could easily have presented to the ITA its claim that the ITA was acting ultra vires by exceeding prescribed statutory time limits.[3] Further, requiring presentation of claims like petitioner's well serves Section 1581(c)'s policy of affording an agency the initial opportunity to rule on challenges to its conduct: resolution of petitioner's challenge would require a construction of the statutes the agency is charged with administering, and the agency is owed deference in such matters. See, *e.g.*, *NLRB* v. *United Food & Commercial Workers Union, Local 23*, No. 86-594 (Dec. 14, 1987), slip op. 10. In short, petitioner could and should have

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399 (C.C.P.A. 1982). The court there found that the delay in proceeding under Section 1581(a) was too great, in light of the threat of immediate and irreparable harm to an industry and a substantial impact on the national economy. Accordingly, the court held that jurisdiction was available under Section 1581(i).

[3] Petitioner's reliance (Pet. 6-8) on *Leedom* v. *Kyne*, 358 U.S. 184 (1958), a case arising under the National Labor Relations Act, 29 U.S.C. 151 *et seq.*, is misplaced. This Court there found general federal question jurisdiction over a claim of ultra vires agency action that could not have been raised in court in any other way. No bypassing of specific statutory mechanisms for judicial review was involved. Moreover, the plaintiffs had participated in the challenged administrative proceedings and raised the claim they subsequently brought to court.

raised its claim of untimely ITA action before the ITA and then, if judicial review was still necessary, sought review under Section 1581(c).

Petitioner makes some suggestions (Pet. 6-16) that the decision of the court of appeals conflicts with other decisions in the Federal Circuit. But an intra-circuit conflict, especially a conflict between a court of appeals and lower courts subject to its review, would not be a sufficient reason for this Court to grant certiorari. In any event, there is no such conflict. Petitioner has not pointed to any decision in the Federal Circuit or its predecessors that is contrary to the ruling below.[4] And the ruling is entirely consistent with and amply supported by the relevant precedent in that circuit. See, *e.g.*, *American Air Parcel Forwarding Co.* v. *United States*, 718 F.2d 1546 (Fed. Cir. 1983), cert. denied, 466 U.S. 937 (1984); *United States* v. *Uniroyal, Inc.*, 687 F.2d 467 (C.C.P.A. 1982); *Royal Business Machines, Inc.* v. *United States*, 669 F.2d 692 (C.C.PA. 1982); *Pistachio Group of Ass'n of Food Indus.* v. *United States*, 638 F. Supp. 1340 (Ct. Int'l Trade 1986); *Wear Me Apparel Co.* v. *United States*, 636 F. Supp. 481 (Ct. Int'l Trade 1986).[5]

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[4] In particular, contrary to petitioner's suggestion (Pet. 13-16), the ruling below does not conflict with either *Montgomery Ward & Co.* v. *Zenith Radio Corp.*, 673 F.2d 1254 (C.C.P.A.), cert. denied, 459 U.S. 943 (1982), or *UST, Inc.* v. *United States*, 648 F. Supp. 1 (Ct. Int'l Trade 1986), aff'd, 831 F.2d 1028 (Fed. Cir. 1987). In *Montgomery Ward*, the court held that a settlement agreement between the United States and importers was not reviewable under either Section 1581(c) or Section 1581(i) because Congress did not intend to make settlement agreements reviewable (673 F.2d at 1260-1261). In *UST, Inc.*, the court found Section 1581(i) jurisdiction over plaintiffs' request for a writ of mandamus to compel the ITA to complete a Section 1675 proceeding in which plaintiffs were participating. Because the proceeding was not yet complete, the mandamus request could not have been heard under Section 1581(c).

[5] Petitioner also argues the merits of its timeliness challenge to the ITA's Section 1675 proceeding (Pet. 17-28). This argument is not

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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Solicitor General

DECEMBER 1987

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properly before the Court. The court of appeals did not address it, but instead correctly concluded that there was no jurisdiction to consider the argument because petitioner bypassed the proper procedure for raising it. To the extent the legal issue is of any importance, it can and will be raised in the future. Here, we simply note our agreement with the decisions that have addressed this question, all of which have rejected petitioner's position. Pet. App. 10a-11a; *Nissan Motor Corp.* v. *United States,* 651 F. Supp. 1450 (Ct. Int'l Trade 1986); *UST, Inc.* v. *United States, supra; American Permac, Inc.* v. *United States,* 642 F. Supp. 1187 (Ct. Int'l Trade 1986); *Philipp Bros.* v. *United States,* 630 F. Supp. 1317 (Ct. Int'l Trade 1986), appeal dismissed, No. 86-1122 (Fed. Cir. July 18, 1986).

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